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No. 91-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a municipal ordinance that suppresses advertising by real estate brokers in order to maintain the current racial balance of the municipality's population violate the First Amendment and the Equal Protection Clause?

II. Does a municipality violate the due process right of fair notice of the conduct prohibited when it prosecutes all business communications from real estate brokers under an ordinance that prohibits only communications "intended to induce the sale, rental or listing" of a dwelling?

III. Does a municipal ordinance restricting the size, number and placement *only* of real estate "for sale" signs in order to maintain the current racial balance of the municipality's population violate the First Amendment?

IV. Does a municipal affirmative marketing plan whose purpose is to increase the likelihood that whites, rather than blacks, will purchase three specific homes in that municipality violate the Equal Protection Clause?

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PETITION FOR WRIT OF CERTIORARI

The Petitioners, Greater South Suburban Board of Realtors® and National Association of Realtors®, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on June 19, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 935 F.2d 868, and is reprinted in the Appendix hereto, pp. 1-59 (hereinafter cited as "App., p. ____").

The opinion of the United States District Court for the Northern District of Illinois is reported at 713 F.Supp. 1068, and is reprinted in the Appendix hereto, pp. 64-136.

JURISDICTION

The judgment of the Court of Appeals was entered on June 19, 1991. (App., p. 60.) A timely petition for rehearing was denied on September 5, 1991. (App., p. 62.) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

First Amendment:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

Fourteenth Amendment:

> §1 ". . . nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

The nine Municipal ordinances involved are reproduced at pp. 139-148 of the Appendix. There are five anti-solicitation ordinances (Matteson Article IV, §§32.100; Glenwood Article IV, §§28-21; Hazel Crest §§ 14-32 and 14-27; Country Club Hills §§ 19.2.01, 19.6.01 and 19.6.02; and Park Forest §§ 24½-2 and 24½-3) and four sign ordinances (University Park §1272.07(a)(2); Country Club Hills §§ 15.11.11; Matteson §§ 159.55.11 and Park Forest §31-147(d)) at issue.

STATEMENT OF THE CASE

The Parties

Petitioner the National Association of Realtors® (NAR) comprises approximately 829,000 licensed real estate brokers and sales agents ("Realtors" or "brokers") located throughout the United States. NAR's relevant organizational goals are to: (1) help its members understand and comply with laws governing the sale of housing, and fair housing laws in particular; (2) promote the benefits of the Realtor designation to the public; and (3) establish a free and open housing market that operates without regard to race. (*See* App., p. 85.) Petitioner the Greater South Suburban Board of Realtors® (GSSBR) is a member local board of the NAR.[1] As a member of the NAR, the GSSBR shares the NAR's goals and promotes those goals through a variety of training sessions on topics that include fair housing principles. Twenty to twenty-five of the GSSBR's approximately 170 member real estate firms are owned and operated by black brokers. Black brokers tend to serve black homeseekers, while white homeseekers favor white brokers. (*Id.*, pp. 68-69.)

[1] The NAR and GSSBR both are Illinois not-for-profit corporations. Neither has a parent or subsidiary.

Respondents the Cities of Blue Island and Country Club Hills and the Villages of Calumet Park, Glenwood, Hazel Crest, Matteson, Park Forest, Richton Park and University Park[2] (the "Municipalities") are suburbs of Chicago. The Municipalities lie in a geographically identifiable region of Illinois known as the South Suburban Area; this region also defines the territory of the GSSBR. (*Id.*, p. 66.)

Respondent the South Suburban Housing Center ("SSHC") is an Illinois non-profit corporation concerned with maintaining racial integration in the South Suburban area. A study of the SSHC commissioned by Park Forest, conducted by the University of Illinois and introduced at trial by the Municipalities found that:

> "[T]he Housing Center is supported by Park Forest Funds, and undertakes its activities at the direct request of the Village. Other governmental bodies contribute additional funds to the Center's operation. . . . [T]his close coordination clearly demonstrates the unity of purpose and direction shared by the Village and the Housing Center. Viewing the activities of the Village and the Center in their totality, it seems that they have a sufficiently close nexus to make it fairly likely that they would be regarded as 'state action' for the purpose of the Fourteenth Amendment." (Joint Appendix (filed in Court of Appeals, hereinafter "Jt. App.") 887-88.)

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[2] Because of the similarity among the challenged ordinances of the nine municipal respondents, the District Court entered two agreed orders providing that it would "make no findings and grant no relief" with respect to Blue Island, Calumet Park, Richton Park and University Park (except as to University Park's sign ordinance). (*Id.*, p. 85, n.5.) Those four municipalities agreed to abide by any relief granted by the court regarding ordinances substantially identical to any of their own. (*Id.*)

Racial Change In Chicago's South Suburbs

The Municipalities once were all-white communities. In the 1960s and 1970s, significant numbers of blacks moved to these communities. In 1980, 12% of Country Club Hills' residents and 44.3% of University Park's residents were black. (App., pp. 86-88.) At the time of trial (1987), estimates placed the black populations of Hazel Crest at 25-30%, Glenwood at 15-20%, and Matteson at 12%. (*Id.*) Racial change has occurred unevenly across the South Suburban Area. Some parts of the Municipalities remain exclusively or predominantly white, while others are predominantly black.

The District Court found that the Municipalities are "threatened with resegregation." (*Id.*, p. 68.) The court traced this threat to a "complex mix of market forces," including the preference of some whites and some blacks to live in segregated communities, a belief that high concentrations of blacks lower home values, and an expectation that integration eventually will give way to resegregation. (*Id.*) The court also found that brokers respond to their customers' housing preferences, rather than "promoting integration for the sake of integration." (*See Id.*, pp. 68-69.) "Accordingly, they are followers and not leaders of change in housing patterns." (*Id.*, p. 69.)

The court did not identify any illegal or invidious activity currently underlying the process of racial change in the South Suburbs. Nor did the court find any evidence of sudden, wrenching, or panic transition. Instead, gradual racial change has come to the South Suburban Area because a large number of comparatively young, well-educated and financially stable blacks would like to raise their families in these pleasant communities, and many whites, who are free to live wherever they choose, have chosen not to live near blacks. (Jt. App. 277, 445-46, 485-500, 889-90; Tr. 453, 621, 6809-10.)

Residents' beliefs that increases in black population in the Municipalities would lead to declines in home values and resegregation are based on stereotypes and misperceptions. Whites tend to perceive that black influx lowers the status of their communities (Jt. App. 486); in fact, however, new black residents of Park Forest on average are better educated, better employed and better paid than the Village's predominantly white long-term residents (Jt. App. 889-90). Similarly, the Municipalities' expert, Professor Gary Orfield, and the Realtors' expert, Dr. Brian Berry, agreed that whites often exaggerate the extent of racial change in their communities. (Jt. App. 498-500, 592.) Municipal officials knew these stereotypes and misperceptions were at work in the Municipalities. Ronald Bean, President of Park Forest from 1981 to 1986, testified: "In some neighborhoods [residents] get on the phone [to Village officials] when they [see] the first black walking down the street or driving by." (Jt. App. 310.)

The Municipalities' Integration Maintenance Programs

In order to prevent further increases in their black population, the Municipalities launched "Integration Maintenance" programs in the early 1980s. The Municipalities added provisions to their fair housing ordinances curtailing real estate "solicitation," imposed outright bans, extensive restrictions, or both on real estate "for sale" signs, and Park Forest and SSHC used "affirmative marketing" to influence whites, rather than blacks, to purchase three homes on Apache Street in Park Forest.[3]

[3] The Municipalities' Integration Maintenance programs involve other elements that are not at issue in this petition such as data collection, counseling, testing and other activities.

Anti-Solicitation Ordinances

The anti-solicitation ordinances forbid real estate brokers to "solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the [Municipality] that he does not desire to be so solicited." (App., pp. 111-112.) The ordinances define "solicit" or "solicitation" as communications which are "intended to induce the sale, rental or listing for sale or rental" of the recipient's dwelling. (*Id.*, pp. 112-113.) Direct mail, leaflets and pamphlets delivered to, in-person contacts at, and telephone calls to dwellings are prohibited. (*Id.*) The ordinances require each Municipality to deliver to each GSSBR member firm a list of residents who participate in the Municipality's anti-solicitation program. (*Id.*) (Non-members of the GSSBR apparently are not affected by the ordinance.) Except in Park Forest, violations of the ordinances are punishable by fines of up to $500 (*id.*, p. 113) (each piece of mail, leaflet and call is a separate violation); Park Forest leaves its penalty to the discretion of its Village Board (*id.*).

The District Court found that, "[t]he municipalities . . . employ anti-solicitation ordinances in their integration maintenance programs." (*Id.*) The court also found that the ordinances are:

> based on the *desire to protect residents from exposure to advertising* because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. *As with 'for sale' sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities.* (*Id.* (citations omitted, emphasis added).)

Most current homeowners in the Municipalities are white; most homeseekers are black. (*See Id.*, pp. 86-88; Jt. App. 943, 946; MX 507A, 508B.)

Neither the text nor legislative history of the original Municipal ordinances mentioned the word "privacy." A purported privacy interest first appeared when, as the District Court found, the Municipalities amended the ordinances "on the advice of their trial counsel," and "[i]n response to the instant suit and [other] suits challenging Hazel Crest and Matteson's ordinances." (*Id.*, p. 114.) Based on references in these mid-litigation amendments, the District Court found that privacy was "[a]nother purpose of the anti-solicitation ordinances." (*See id.*, p. 115.)

The District Court found that "[t]he anti-solicitation ordinances are designed to make solicitation more difficult and expensive." (*Id.*, pp. 114-115.) Cooperative bulk mailing and mass marketing by direct mail companies, which are brokers' most cost-effective advertising media, illustrate this effect. It is neither commercially feasible nor desirable for these companies to "target" mailings to non-signatories. Therefore, the participation of even a single resident in a mass mailing zone effectively denies brokers the use of this medium, even to reach residents who have not agreed to participate in municipal anti-solicitation programs. (Tr. 2083-84, 3980-85.)

Ironically, the success of the Municipalities' anti-solicitation programs depends directly upon how vigorously the Municipalities solicit residents' participation. (*See App.*, p. 115.) Hundreds of households participate when Municipalities repeatedly solicit residents by mail and in person. (Jt. App. 1184-85, 1190-91, 1194-95, 1196-98.) In contrast, Park Forest did not solicit residents' participation; only 10 of approximately 9000 households placed their names on that municipality's anti-solicitation list. (Tr. 5151-52; MX 421.)

An example of the scare tactics employed in Municipal anti-solicitation campaigns is a newsletter Matteson sent residents urging them to sign anti-solicitation notices to prevent "panic peddling" and blockbusting:

> Unscrupulous real estate people will use the panic peddling methods as part of their selling practices, particularly during soliciting, in order to create alarm among residents . . . . Real estate people who created the alarm will begin "steering" minorities into the area in increasing numbers while steering whites away, until it becomes resegregated or changed. (Jt. App. 1184-85.)

Matteson's newsletter did not advise residents that blockbusting and panic peddling in fact were not occurring in Matteson or the other Municipalities (Jt. App. 636-37), or that Federal, State and other municipal laws all independently, and directly, prohibit blockbusting and panic peddling.

The District Court found that, "[j]ust before trial the municipalities distributed a letter stating that they believe *every* 'business communication' from a real estate broker is a solicitation to list or sell—despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale.*" (App., p. 120 (emphasis in original).) The Municipalities thus "interpret their ordinances to ban all business communication mailed or delivered by real estate brokers, even if their intended purpose was only to generate goodwill, such as holiday calendars, birthday greetings, the sales of investment or vacation property, or to find buyers or referrals." (*Id.* at 115.) The District Court also found that this interpretation reflects "uncertainty of the meaning of the term 'solicitation,' " which "greatly exacerbate[s]" the effect of the ordinances. (*Id.*) Most marketing materials used by brokers do not attempt to induce a sale or listing for sale. (*E.g.*, DX 179, 187, 200, 495.) Because of the threat of prosecution and uncertainty

about what constitutes prohibited communications, however, some brokers have ceased all marketing activities in anti-solicitation municipalities. (*E.g.*, Jt. App. 1172-83.)

"For Sale" Sign Restrictions

The District Court found that " '[f]or sale' signs are a cost effective and valuable form of advertising which benefits homesellers, who get exposure for little cost; homeseekers, for whom signs may be a direct source of information about the availability of homes; and brokers, for whom signs provide a source of sales and a measure of goodwill advertising." (*Id.*, p. 106.) Each of the Municipalities, however, "regulate[s] the use of 'for sale' signs differently from other signs." (*Id.*, pp. 104-106.)

University Park banned "for sale" signs until after the trial began, at which point it repealed its ban and imposed instead an ordinance allowing only one sign per property, which must be placed in a window of the house. (*Id.*, pp. 104-106.) Glenwood also banned "for sale" signs until the eve of trial, despite its Village Attorney's advice that the ban was "patently unconstitutional" under *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). (App., p. 105.) Glenwood disregarded this advice because it concluded "the only result" of a legal challenge would be "to drop [the] ban." (Jt. App. 1156.)

Country Club Hills restricts the size of "for sale" signs to three square feet and three feet in height, permits only one sign per property, and requires its placement within three feet of, and parallel to, the front of the house. (App., pp. 105, 139.) Matteson restricts "for sale" signs to eight square feet and five feet in height; Matteson also permits only one sign per lot and requires that it be placed within 15 feet of the house. (App., pp. 105-106, 140.) Park Forest permits only one sign per lot, and limits the sign to five

square feet, including the frame or post. (App., pp. 105-106, 140.)

Each of these restrictions effectively prohibits the use of most or all industry standard-sized signs (such as "Century-21" signs) and requires brokers to purchase more expensive, less effective custom-manufactured signs for use in each municipality. (Tr. 3823-25.) Uncontroverted testimony established that these size and placement restrictions "practically eliminate" the effectiveness of the signs. (Tr. 3829, 5914.)

The District Court found that the Municipalities enacted their sign restrictions in order to prevent further increases in their black populations:

> "A proliferation of 'for sale' signs is widely perceived to be destablizing to an integrated community. The court therefore finds it reasonable for a municipality to minimize the appearances of 'for sale' sign proliferation so that the community has an opportunity to present the counter message that panic avoidances can lead to a stable integrated community." (App., pp. 106-107 (citations omitted).)

(Despite the court's reference to "panic" in this finding, it is undisputed that no panic selling was occurring at the time of the trial in the Municipalities. The court so found expressly in declaring Hazel Crest's sign ban unconstitutional (*id.*, p. 110), noted that "the [racial] situation had stabilized by . . . 1980" in the subdivision with the largest black population in Park Forest (*id.*, p. 72), and found no evidence of panic transition in any part of any Municipality.)

This finding was supported by uncontroverted evidence of Municipal intent to limit minority demand for homes through sign restrictions. Country Club Hills, for example, enacted a voluntary "for sale" sign restraint program designed to "stop some of the [homeseeking] traffic that

we have on ride throughs." (App., p. 105.) Uncontroverted evidence demonstrated that black homeseekers are more dependent on signs as a source of housing information than are white homeseekers, particularly when they are hoping to move to a predominantly white community. (Tr. 2079-80; 4679-81; 4716-17; 7771.) The sign restrictions also have a disproportionate negative impact on black real estate brokers who, being relatively new to predominantly white suburbs, are particularly dependent upon signs as a means of both marketing their listings and establishing their presence in the community. (Tr. 2052-53; 2611-12; 4097; 7771.)

The District Court noted that the preambles to the sign ordinances declared that their purpose is "community aesthetics." (*Id.*, pp. 104-106.) In contrast to their integration maintenance purpose, however, the court made no findings as to how regulating real estate signs differently from all other signs promotes "community aesthetics."

The Apache Street Affirmative Marketing Plan

Apache Street is located in the Eastgate subdivision of Park Forest. (App., p. 71.) In the 1970s, a subdivision in neighboring Chicago Heights was built and marketed, successfully, to black residents of Chicago. *Id.* Racial turnover ensued in an adjoining Chicago Heights subdivision. (*Id.*) These developments sparked rumors in the early 1970s that Eastgate was "going black." (*Id.*) By 1980, however, "the situation had stabilized;" Eastgate was 25% black and Apache Street was 56% black. (*Id.*)[4]

[4] The trial court found that "VA and FHA mortgage foreclosures in Eastgate leading to abandoned homes and neighborhood blight were an ongoing problem" (*id.*), but made no finding as to the race of defaulting mortgagors.

Still, in 1982, Village officials received frequent complaints from Eastgate and Apache Street residents expressing a "perception" that Apache Street was "a black block." (Jt. App. 294; *see* App., p. 72.) Village officials knew this perception was inaccurate (Jt. App. 299-301), and an overreaction (*id.* 297). Nevertheless, Ronald Bean, Park Forest's President in 1982, testified that, "whether the neighborhood was or was not a predominantly minority neighborhood was not as important as what the people in the area believed it to be." (*Id.* 294.)

Bean continued, "it would not do us any good" to try to correct this misperception with facts. (*Id.* 301.) Instead, Bean said, Village leaders felt they had to "do something." (*Id.*) "And one of the things we felt we had to do was to buy those three abandoned homes and have them marketed and try to increase white traffic." (*Id.*) Thus the Village purchased vacant homes at 9, 15 and 26 Apache Street ("the Apache Street homes"). (App., pp. 72-73.) Park Forest then sold the homes to SSHC. *Id.* Bean testified, "we in our contract with [SSHC] asked that the properties be affirmatively marketed to the population we felt based on information was going to be underrepresented; that is, whites." (Jt. App. 299.)

The SSHC entered into listing agreements with broker William Motluck for the Apache Street homes. The listing agreements conditioned payment of a sales commission upon Motluck's compliance with an affirmative marketing plan ("AMP"). (App., p. 73.)

The AMP provided that Motluck was to make a special outreach to whites by advertising in newspapers with a predominantly white circulation and distributing information to selected rental developments and employers where whites could be reached. (*Id.*) Although the listings forbade "any action which prohibits, restricts, narrows or

limits the housing choice of any client on the basis of race," (*id.*), training materials prepared by SSHC for a seminar required by the AMP instructed Motluck's sales agents not to tell blacks about the Apache Street homes unless asked about them specifically (Jt. App. 1147). And although the AMP provided that Motluck was to use his best efforts to attract minority and majority persons to the Apache Street homes, former President Bean testified that Park Forest preferred that Motluck not advertise the homes at predominantly black rental developments. (Jt. App. 290.)

The District Court found that the Apache Street AMP has "a racially disparate impact." (App., p. 80.) The court also found that the AMP adversely affected the availability of housing by increasing the likelihood the Apache Street homes would be sold sooner or at a higher price. (*Id.*, p. 99, n.7.) SSHC admitted that "a possible consequence of successful implementation of the Plan would be to increase the likelihood that a white would buy, and decrease the likelihood that a black would buy the Apache Street homes." (R-92, pp. 14-15.) SSHC also admitted that "the intended effect of the Plan is to discriminate between the races." (*Id.*)

The District Court found that the AMP's disparate impact "is lessened if [not] non-existent" because SSHC's affirmative marketing "works both ways." (App., p. 99, n.7.) The SSHC's promises of outreach to blacks as well as whites, however, evaporated in practice. In fact, the Apache Street AMP is the only such affirmative marketing effort undertaken to date by any of the Municipalities, even though each is predominantly white and has areas that are almost exclusively white. (Jt. App. 422-23, 531-32, 580-81.) Apart from encouraging *Realtors* to conduct affirmative marketing—which they already do in a dramatically

different form under agreement with the United States Department of Housing and Urban Development[5]—the only outreach to blacks undertaken by SSHC was a newspaper advertisement urging blacks to move to Chicago's southwest suburbs, an identifiable area distinct from the South Suburban Area. (Jt. App. 1104.)

The Apache Street AMP failed to secure white buyers, although the houses were sold. The ordinance that authorized Park Forest's purchase and sale of the Apache Street homes remains in effect. The SSHC resolved to use the profits from the sale of the Apache Street homes to fund another AMP. (PX 14.)

Petitioners' Challenges To Respondents' Integration Maintenance Programs

Petitioners contend the anti-solicitation ordinances violate their First Amendment rights by suppressing truthful information about real estate for the impermissible purpose of maintaining the racial status quo. Petitioners

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[5] The NAR, GSSBR and their members participate in a Voluntary Affirmative Marketing Agreement with HUD ("the VAMA"). (App., p. 70.) When originally conceived in the 1970s in response to enactment of the Fair Housing Act of 1968, the VAMA defined affirmative marketing "as a program to inform the *minority community* of the homes listed for sale or rent by Realtors, of the services offered by Realtors in selecting a home for purchase, and of the availability of these homes and services to all buyers without regard to race, color, religion, sex or national origin." (*Id.* (emphasis in original).) The District Court found that "[t]his form of affirmative marketing is justified as remedial; i.e., to open up areas that had previously been closed to minorities because of past discriminatory practices." (*Id.*) In the 1980s, NAR and HUD reviewed and revised the VAMA, as required by its terms. In the current version, the NAR adopted a proposal, made by HUD, that calls for color-blind marketing practices. (DX 550 at 2; Tr. 1516-18, 1526, 1641-42.)

contend that the Municipalities' purported interest in privacy is insincere, and insufficient in any event, because the ordinances ban communications only about a single viewpoint and ban a form of communication that easily may be ignored. The ordinances also violate brokers' equal protection rights because no demonstrable relationship exists between the Municipalities' purported privacy interest and the ordinances' discrimination against a particular viewpoint. Further, the ordinances' failure to clearly define the speech they prohibit renders them unconstitutionally vague, in violation of Petitioners' due process rights.

The Municipalities' "for sale" sign restrictions also violate the First Amendment rights of Petitioners and their clients because they impose special restrictions on real estate advertising to promote an impermissible interest in maintaining the racial status quo.

Finally, the Apache Street AMP violates the equal protection rights of Petitioners' black members and customers by employing an improper racial classification to manipulate the housing decisions of prospective residents. (Petitioners' other challenges to these laws and activities, and to other aspects of the Integration Maintenance programs, are not asserted in this Petition.)

Petitioners sought a declaration that the ordinances and the Apache Street AMP are unconstitutional. The District Court had jurisdiction over those claims under 28 U.S.C. § 1331.

The District Court's Ruling

The District Court ruled that the anti-solicitation laws violate Petitioners' First Amendment and due process rights "insofar as they prohibit forms of communications

from brokers to signators of the municipal anti-solicitation lists other than solicitations actually seeking to induce the sale, rental or listing of dwellings." (App., 117-119.) The court based its First Amendment ruling on its conclusion that the ordinances' "effect of banning all communication by mail from Realtors is far more extensive than necessary." (*Id.*, p. 118.) The court's due process ruling followed its conclusion that the definition of solicitation in the ordinances "could be interpreted (and is by [the Municipalities]) to include virtually anything, such as an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office." (*Id.*, p. 119.) The court also concluded that the text of the ordinances provides insufficient warning that the Municipalities would consider "*every* 'business communication' from a real estate broker [to be] a solicitation to list or sell—despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale.*" (*Id.* (emphasis in orig.)) The court did not rule on Petitioners' equal protection claim.

The court ruled that the Municipalities' "for sale" sign restrictions are reasonable time, place and manner restrictions and therefore do not violate the First Amendment.

Finally, the court held that the NAR and GSSBR lack standing to assert an equal protection challenge to the Apache Street AMP because that "claim would clearly rest on legal rights of minority homebuyers rather than those of homesellers." (*Id.*, p. 104.)

The Court Of Appeals' Ruling

The Court of Appeals upheld the anti-solicitation ordinances in their entirety, affirming in part and reversing in part the District Court's ruling. The court's statement

of facts acknowledged the District Court's finding that "the ordinances are designed to . . . maintain the [racial] status quo and to reduce the ability of homeseekers to find homes in the municipalities," but the court's analysis ignored this finding and instead focused entirely on a purported interest in protecting residential privacy. (App., p. 37.) The court perceived no vagueness in the ordinances because it "fail[ed] to see a 'substantial risk of miscalculation' " as to the meaning of "solicitation" if brokers refrained from *all communications* to participating homeowners. (*Id.*, p. 52, emphasis added.) Finally, the court held that its ruling on Petitioner's First Amendment claim foreclosed their equal protection claim because the court "fail[ed] to see any distinction between the First Amendment 'sufficient fit' analysis and the Fourteenth Amendment's 'rational basis' inquiry." (*Id.*, 53.)

The court upheld the Municipalities' "for sale" sign restrictions. It accepted the ordinances' declared purpose—community aesthetics, again ignoring the District Court's sole efficacy finding: that the ordinances are a reasonable measure to minimize the advertising value of the signs and thus prevent racial change. (*Id.*, pp. 54, 106-107.) The Court of Appeals then ruled that the ordinances directly advance an interest in aesthetics because uniform, regulated placement "will not prove as unsightly as haphazard placement," but cited no finding—by either the Municipalities or the District Court—that owners hoping to sell their homes place "for sale" signs in an unsightly, haphazard fashion. (*Id.*, pp. 54-55.) Finally, the court perceived a reasonable fit between the restrictions and an aesthetic purpose because it concluded homeseekers are able to learn of available housing despite the restrictions. (*Id.*, p. 55.)

Like the District Court, the Court of Appeals did not consider the constitutionality of the Apache Street AMP because it concluded Petitioners lack standing to assert

that challenge. (*Id.*, p. 21.) The court acknowledged that Petitioners demonstrated sufficient "injury in fact" to satisfy Article III's case-or-controversy requirement. (*Id.*, pp. 17-18.) The court concluded, however, that "prudential" considerations foreclose a review of the merits because Petitioners' claim rests on the rights of third parties: homeseekers. (*Id.*, p. 18.)

REASONS FOR GRANTING THE WRIT

The three municipal activities at issue in this Petition implicate different aspects of a single question: whether a municipality may attempt to manipulate its real estate market to preserve its character as an integrated but predominantly white community? This Petition raises important subsidiary questions as well. May a municipality shield such manipulation of its real estate market from effective judicial review by reciting non-racial justifications such as protection of residential privacy and community aesthetics? Do Realtor organizations, whose members include black brokers and represent black homeseekers, have standing to challenge a municipal program born of the municipality's conclusion that it had to "do something" to assuage white residents' perception that their neighborhood already had too many black residents and designed to diminish the likelihood that blacks would succeed in purchasing three specific homes in that neighborhood?

These questions are of exceptional and growing importance. They "bear on one of the most important decisions [residents] have a right to make: where to live and raise their families." *Linmark Assocs.*, 431 U.S. at 96. As minorities follow better employment and housing opportunities from central city to suburban areas, minority homeseekers and predominantly white suburbs increasingly confront these questions. Indeed, suburban housing opportunity will be a principal topic in race relations for years to come. The

Municipalities' proximity to Chicago's south side cast them among the first suburbs to attempt to maintain racial balance; now many other suburban communities look to that experience—and this case—for guidance in discerning government's proper role, if any, in maintaining racial balance in the housing market. (*See, e.g.*, The Washington Post, June 29, 1991, §E (Real Estate) at 1, quoting the attorney for SSHC, "It's likely that there will be renewed interest now in affirmative marketing as a real estate marketing technique. I think we will see increased use of ordinances of this type on the part of municipalities.")

I.

The Anti-Solicitation Laws Violate Petitioners' First Amendment And Equal Protection Rights By Stifling Expression Of Their Viewpoint In Order To Manipulate Residents' Housing Choices.

Brokers attract referrals and listings by distributing an eclectic variety of written materials. These materials may include certificates for a free evaluation of a home's market value, information about the broker's credentials, holiday greeting cards and calendars, announcements of promotional contests, and catalogues of homes available for sale. Brokers also may use telephone calls to identify residents who are interested in their services. The Court of Appeals found that such advertising "concerns lawful activity and is not misleading." (App., p. 39.)

A. First Amendment

The Court of Appeals analyzed Petitioners' First Amendment challenge under the four-part test for determining the validity of a restriction on commercial speech described in *Central Hudson Gas and Electric Co. v. Public Service Comm'n*, 447 U.S. 557 (1980). (App., p. 38.) Although Petitioners' speech does indeed concern a pro-

posed commercial transaction, the purchase or sale of a home is the largest and most important transaction most people ever make. For many, the significance of this transaction overshadows political events and other subjects of "pure speech," at least while a housing decision is pending. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976). Furthermore, brokers speak not just for themselves, but for their homeseeking and homeselling clients. Thus a free market evaluation, for example, is more than an offer of professional services; it conveys the broker's belief that one of her customers, or another interested buyer, would pay a certain price for a particular home.

This Court has found that commercial speech which "implicates 'substantial individual and societal interests' [and] relates to activity which is protected from unwanted state interference" serves a "paramount" First Amendment interest. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (citing *Bigelow v. Virginia*, 421 U.S. 809 (1975)); *see Linmark Assocs.*, 431 U.S. at 96-97 (societal interest in real estate advertising is no less than interest in advertising of constitutionally protected abortion services at issue in *Bigelow*). Nevertheless, the Court of Appeals described Petitioners' speech as "merely intended to propose a commercial transaction," (App., p. 40), and therefore deferred broadly to the Municipalities' decision to restrict real estate solicitation. (*Id.*, pp. 45-46.)

One aspect of the court's deference is the "flexibility" it accorded the Municipalities to enact a concededly content-based restriction. (*Id.*, p. 38.) The Court contended such flexibility derives from "the greater potential for deception or invasions of privacy" in commercial speech. (*Id.*, p. 38.) Legislative flexibility based on potential for deception has a basis in this Court's decisions, *e.g.*, *Bolger*, 463 U.S. at 65, but no basis in the facts of this case, since Petitioners' speech "concerns lawful activity and is not

misleading." (App., p. 39.) No precedent, however, supports a flexibility to enact content-based restrictions to protect privacy. *E.g.*, *Carey v. Brown*, 447 U.S. 455 (1980) (holding that an interest in protecting residential privacy fails to justify content-based restriction on speech). The Court of Appeal's ruling on this issue also conflicts directly with the Sixth Circuit's recent ruling that content-based restrictions on truthful commercial speech "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *Discovery Network Inc. v. City of Cincinnati*, 946 F.2d 464, 473 (6th Cir. 1991) (quoting *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2474 (1991) (White, J., dissenting)).

Because the anti-solicitation ordinances restrict only real estate advertising, all other speakers are free to contact residents. By countenancing a torrent of junk mail on such comparatively insignificant topics as fast food and dry cleaning services, the anti-solicitation laws are "a rather feeble approach" to the Municipalities' purported privacy interest. *Curtis v. Thompson*, 840 F.2d 1291, 1307 (7th Cir. 1988) (Ripple, J.; dissenting), *app. pending after remand*, No. 89-3248. The record contains no evidence, and neither lower court found, that real estate solicitation is a greater threat to residential privacy than advertising on other topics, *see id.*, or indeed, that it poses a cognizable threat at all. *E.g.*, *Bolger*, 463 U.S. at 72 (the First Amendment does not permit the government to prohibit mailings as intrusive because recipients can simply throw them away), *id.* at 78 (Rehnquist, J., concurring) (mailings are less intrusive than other forms of speech for the same reason). *See also Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (handbilling and solicitation in residential areas are "fundamentally different from" picketing because in such cases "the flow of information [is not] into . . . household[s], but to the public") (quoting *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971)).

Thus the protection of residential privacy cannot have been a genuine purpose underlying these laws. *E.g.*, *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).

Instead, privacy concerns plainly were a *post-hoc* rationalization conceived by the Municipalities' trial counsel in response to this suit. (*See* App., p. 114 (amendments containing first mention of "privacy" were enacted on advice of trial counsel).) *See also Schweiker v. Wilson*, 450 U.S. 221, 244-45 (1981) (Powell, J., dissenting) (Court should receive with skepticism *post-hoc* hypotheses about legislative purpose, and scrutinize legislation more closely); *Craig v. Boren*, 429 U.S. 190, 199 n.7 (1976) (court will not credit "a convenient, but false, *post-hoc* rationalization"). In conflict with the principle of *Craig* and *Wiesenfeld*, the Court accepted this *post-hoc* rationalization without any discussion, and never addressed in its analysis the District Court's finding that "the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities." (*See* App., p. 113.)

The Court of Appeals concluded that the ordinances directly advance a purported interest in privacy, but never said how. (App., pp. 44-45.) Moreover, the court never addressed the conflicting principle, plainly established by decisions of this Court, that privacy concerns do not justify stifling Petitioners' generally-directed speech because residents may simply throw away written material, hang up the phone, or post content-neutral "no solicitation" signs.[6] *See, e.g.*, *Frisby*, 487 U.S. at 487; *Bolger*, 463 U.S. at 72; *Consolidated Edison Co. v. Public Service Comm'n*,

[6] Each of the Municipalities has a content-neutral "no solicitation" law on its books to protect residential privacy. (DX 527, 540-43.) Tellingly, however, the Municipalities did not add their real estate solicitation laws to these ordinances, but rather to their fair housing laws, which deal with racial issues.

447 U.S. 530, 542 (1980); *see also Martin v. Struthers*, 319 U.S. 141 (1943) (upholding content-neutral "no solicitation" laws); *cf. Schultz v. Frisby*, 807 F.2d 1339, 1371 (7th Cir. 1986) (Coffey, J., dissenting) (telephone communications allow the listener to turn off the message, as the Supreme Court requires, and thus protect his own privacy), *vacated on other grnds.*, 818 F.2d 1284, *aff'd* in banc, 822 F.2d 642, and *rev'd*, *Frisby v. Schultz*, 487 U.S. 474.

The Court of Appeals upheld the ordinances largely on the basis of *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), and its sharply divided decision denying a preliminary injunction in *Curtis v. Thompson*, 840 F.2d 1291 (1988), *app. pending after remand*, No. 89-3248. In *Rowan*, this Court upheld a statute that permits a householder to bar from his mailbox any material he finds, in his sole discretion, to be offensive. 397 U.S. at 737. The Court of Appeals here recognized that both the concurring and dissenting judges in *Curtis* believed that the content-neutrality of the *Rowan* statute distinguished it from content-based anti-solicitation laws because content-based laws install government, rather than residents, in the role of censor. But the court responded by pointing to dicta in *Rowan*: "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Id.* at 736-37. It then concluded, without explanation, that this language "has implications far beyond the statute at issue there." (App., pp. 47-48.)

In fact, this Court's decisions subsequent to *Rowan* demonstrate that the Court of Appeals read the *Rowan* dicta far too broadly. As noted above, this Court has held repeatedly that government may not ban communications which are easily ignored by recipients. Furthermore, the anti-solicitation ordinances' content-based discrimination remains a crucial distinction; "First Amendment freedoms would be of little value if speakers had to obtain permission of their audiences before advancing particular view points." *Bolger*, 463 U.S. at 80 (Rehnquist J., concurring). Indeed,

this principle has particular urgency here because any broker attempting to request such permission would: (1) have to overcome the effect of municipal campaigns to incite and organize residents against his speech; and (2) be prosecuted by the Municipalities under their theory that "any business communication" from a broker is a prohibited solicitation. (*See* App., p. 52 (brokers must refrain from further communication when notified of a resident's participation in municipal anti-solicitation program).) The Court of Appeals decided, however, that there is "no problem," (App., p. 53), when a Municipality vigorously presses on residents its viewpoint concerning an important public issue while it stifles brokers' expression of an alternative viewpoint.

B. Equal Protection

Even if one were to credit the Municipalities' purported interest in privacy, a restriction on real estate advertising alone bears absolutely no logical relationship to this purpose. Nevertheless, the Court of Appeals rejected Petitioners' equal protection claim because it believed the "reasonable fit" between the ordinances and the Municipalities' asserted privacy interest satisfied the "rational basis" test applied to a restriction on advertising of casino gambling in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 344 n.9 (1986).

Petitioners pointed out that *Posadas* concerned advertising of an activity that the government could ban altogether, while Petitioners' speech concerns an activity—housing choice—that ranks at the top of our hierarchy of social values. *See Linmark Assocs.*, 431 U.S. at 96; *compare Posadas*, 478 U.S. at 345 (noting the "crucial distinction" between the instant case and cases striking down restrictions on advertising concerning activities that are constitutionally protected and may not be prohibited completely by the State). The Court of Appeals dismissed this argument, again relying on *Rowan* to conclude there is "no

problem" when a municipality singles out a particular viewpoint for suppression, so long as residents choose to participate in the government's censorial scheme. (App., p. 53.) This analysis not only misreads *Rowan*, but it also embraces the unequal treatment of speakers precisely *because* the government disapproves of their viewpoint on a pressing public issue. Indeed, the court's ruling opens the way for government to pursue a limitless variety of "public policies" through purportedly "privacy-based" restrictions on commercial speech.

II.

The Anti-Solicitation Laws Violate Petitioners' Due Process Rights By Failing To Define The Speech Prohibited By Those Laws.

The District Court found that the text of the anti-solicitation ordinances, which defines "solicitation" as a communication "intended to induce the sale, rental or listing" of a home, fails to warn brokers that the Municipalities will prosecute every "business communication" from them to a resident. (App., p. 1096.) Therefore the court held the ordinances unconstitutionally vague. (*Id.*) The Court of Appeals reversed, ruling that it saw "no substantial risk of miscalculation" if brokers simply "refrained from further communication to these addresses." (App., p. 52.) This Court, however, has not required those subject to a criminal law to cease all arguably prohibited activity in order to resolve vagueness in the law's terms. *A fortiori*, brokers should not be forced to cease speaking about topics plainly permitted by the law's language—such as an advertisement seeking *buyers* for homes that already are for sale (DX 200, 495)—simply because a government official sent a letter saying the government would interpret the law to prohibit all communications about those topics. The Court of Appeals' ruling thus conflicts in principle with *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (ordinance unconstitutionally vague if

it fails to inform citizens what conduct is prohibited and vests broad and standardless discretion in local officials).

III.

The Municipalities' Sign Restrictions Violate The First Amendment Because They Are Intended To Preserve The Racial Status Quo In the Municipalities.

There is substantial evidence in the record that the Municipalities enacted their sign restriction ordinances in order to influence the housing choices of their residents to prevent a change in the racial balance; indeed, the District Court found it was "reasonable" for them to do so. (App., p. 160.) The Court of Appeals never mentioned this finding; like the District Court, it accepted as genuine the declared purpose of promotion of aesthetic concerns, despite citing no evidence to support this conclusion beyond the mere recitation of this interest in the ordinances' preambles. (*Id.*, p. 54.)

This Court, however, has rejected the notion that a law that restricts real estate signs more severely than signs bearing any other content "promote[s] aesthetic values or any other value 'unrelated to the suppression of free speech.' " *Linmark Assocs.*, 431 U.S. at 93 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 510 (1981) (courts must carefully scrutinize purported aesthetic judgments "to determine if they are only a rationalization of an impermissible purpose"). Careful judicial scrutiny is particularly necessary here because the race-related purpose the District Court found "reasonable" is so similar to the purpose this Court found impermissible in *Linmark Assocs.*:

> "The Council has sought to restrict the free flow of [information pertaining to sales activity in Willingboro] because it fears that otherwise homeowners

> will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave town." 431 U.S. at 96.

The *Linmark Assocs.* Court held that the First Amendment denies government the "sweeping powers" to manipulate its residents' housing choices in this fashion. *Id.* at 96. The Court of Appeals' refusal to scrutinize carefully these sign laws invested these powers in the Municipalities, in conflict with the principle and holding of *Linmark Assocs.*.

IV.

The Apache Street Affirmative Marketing Plan Violates The Equal Protection Clause Because It Employs A Race-Conscious Measure To Preserve The Racial Balance Preferred By The White Majority.

It is undisputed that Park Forest enacted and SSHC implemented the Apache Street AMP based solely on race. This Court has repeatedly held that such racial classifications "are inherently suspect and thus call for the most exacting judicial scrutiny." *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 291 (1978); *see Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). As this Court wrote in *City of Richmond v. Croson*:

> Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there

> is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. 488 U.S. 469, 493 (1989).

Had either lower court scrutinized the constitutionality of Park Forest's AMP, it would have been constrained to find that the AMP violates the Equal Protection Clause.

Park Forest offered no compelling interest to justify its preferential treatment of white homeseekers. *See Wygant*, 476 U.S. at 274. This Court has upheld racial classifications only when necessary to remedy past discrimination by the sponsor of affirmative action, but whites have never been the *victims* of racial discrimination by, or even in, Park Forest. Consequently, Park Forest failed to identify specific discrimination "with the particularity required by the Fourteenth Amendment" *Croson*, 488 U.S. at 490-491. Village officials instead chose to respond to popular misperceptions about the racial situation on Apache Street by implementing a race-conscious plan because they concluded that the alternative—an attempt to counter these misperceptions with facts—"would not do us any good."

Park Forest's AMP further fails to meet any of the tests considered by this Court to determine whether a race-conscious plan is "narrowly tailored to remedy . . . past discrimination." *Croson*, 488 U.S. at 497-501; *see Wygant*, 476 U.S. at 475, 483; *Bakke*, 438 U.S. at 310, 320. The *Croson*, *Wygant* and *Bakke* decisions establish that a narrowly-tailored race-conscious remedy is one that: (1) avoids unnecessary harm to innocent third parties; (2) does not rely on an absolute racial preference to the exclusion of other attributes; (3) employs clear standards; and (4) is temporary. The Court of Appeals effectively let stand a plan that offends every one of these principles.

The lower courts failed to strictly scrutinize the Apache Street AMP because they concluded that Petitioners do not have standing to bring this claim. Although the Court

of Appeals agreed that Petitioners have suffered an injury in fact, it erroneously held that Petitioners failed to satisfy "prudential" standing concerns.

The interests of brokers and homeseekers regarding such race-conscious plans are deeply intertwined. Indeed, a broker who implemented the Apache Street AMP by bringing in additional white bidders with the purpose of diminishing the likelihood that a black customer would be able to buy a home would violate the NAR's Code of Ethics and the Fair Housing Act. *See Village of Bellwood v. Dwividi*, 895 F.2d 1521, 1532 (7th Cir. 1990); (Tr. 1478; DX 49 at 29). Furthermore, if the broker's black customer never learns of an Apache Street house or is outbid because another broker brings in additional white bidders, the first broker loses a sales commission. The broker working with the black homeseeker, who likely is black himself and has mostly black customers, will not make up this loss elsewhere; Park Forest has not purchased and affirmatively marketed housing to blacks.

Moreover, Petitioners' black homeseeking prospects are practically precluded from challenging the Apache Street AMP themselves. If the AMP operates as designed, they will never learn that they are its victims. Furthermore, a homeseeker who was outbid by as little as a few hundred dollars for a home is unlikely to be able or willing to finance years of litigation to vindicate his rights.

Finally, the lower courts' reliance on Petitioners decision not to produce a black homeseeker to protest the Apache Street AMP embraces a paternalistic and stigmatizing (to black homeseekers and brokers alike) view that blacks may benefit from a decision by a community's white majority that they would be better off living and working elsewhere. At the same time, it ignores the far more credible view that black homeseekers and brokers alike object to the white majority's conclusion that their interest in Park

Forest is a "problem" that requires municipal "affirmative" action. (Ironically, Petitioners' proposed testimony from an official of a local chapter of the NAACP was excluded by the District Court (Tr. 4872-73) and not considered by the Court of Appeals. That official authored one letter that was admitted; there, she wrote of Integration Maintenance programs: "Racial balancing is anathema for Blacks as we are seen as spoilers of communities. . . . No other group in America is subjugated in this manner." (DX 437.))

In sum, the Court of Appeals' ruling that Petitioners failed to satisfy "prudential concerns" conflicts with this Court's frequently invoked principle that vendors have standing to assert the rights of customers to challenge a law that interferes with the customers' ability to purchase the vendor's goods or services. *E.g., Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989); *Singleton v. Wulff*, 428 U.S. 106 (1976).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals should be granted.

Respectfully submitted,

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91-925
(2)
Supreme Court, U.S.
1991

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 89-2115, 89-2122, 89-2123, 89-2218,
89-2767, 89-2777, 89-2778 and 89-2846

SOUTH SUBURBAN HOUSING CENTER,

Plaintiff-Appellee,
Cross-Appellant,

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS
and NATIONAL ASSOCIATION OF REALTORS,

Defendants, Counterplaintiffs-
Appellants, Cross-Appellees,

v.

CITY OF BLUE ISLAND, et al.,

Counterdefendants-Appellees,
Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 8149—**Harry D. Leinenweber,** *Judge.*

ARGUED FEBRUARY 15, 1990—DECIDED JUNE 19, 1991

Before WOOD, JR., COFFEY and FLAUM, *Circuit Judges.*

COFFEY, *Circuit Judge.* These consolidated appeals deal with a variety of constitutional and Fair Housing Act chal-

lenges to real estate marketing activities and municipal ordinances affecting the real estate market in a number of the southern suburbs of Chicago, Illinois. The municipalities involved are the Cities of Blue Island and Country Club Hills and the Villages of Calumet Park, Glenwood, Hazel Crest, Matteson, Park Forest, Richton Park and University Park. The court disposed of these issues following a bench trial consisting of approximately eight weeks of testimony presented intermittently between March 23, 1987, and September 1, 1987.

We affirm 1) the district court's finding that Greater South Suburban Board of Realtors and National Association of Realtors (the Realtors) did not violate the Fair Housing Act in excluding South Suburban Housing Center's (SSHC) Apache Street homes from the Multiple Listing Service or in commencing disciplinary action against SSHC's realtor, William Motluck; 2) the trial judge's determinations that the Realtors lacked standing to pursue their Equal Protection claim against SSHC and Park Forest and that the affirmative marketing plan applicable to the Apache Street homes was permissible under the Fair Housing Act; 3) the district court's determinations upholding against First Amendment challenge the municipal ordinances of Country Club Hills, Matteson, Park Forest and University Park concerning the size, placement and number of "for sale" signs; and 4) the trial court's conclusion that the municipal ordinances of the City of Country Club Hills and the Villages of Hazel Crest, Matteson, Glenwood and Park Forest limiting solicitation did not violate the Fair Housing Act. We reverse the district judge's finding that the anti-solicitation ordinances of the abovementioned municipalities violated the First Amendment and were unconstitutional because of vagueness. We also reverse the district court's conclusion that the Country Club Hills permit fee for the erection of "for sale" signs was free from constitutional infirmity. And we remand for further consideration the Realtors' claim that the Village of Glenwood's ban of "for sale" signs violated the Fair Housing Act, despite the eleventh-hour repeal of the same.

I. FACTS

The municipal defendants are located in an area bordered on the north by the City of Chicago, on the west approximately by Harlem Avenue or Interstate 57, on the south roughly by Will County and on the east by the Indiana State line. The district court found that these formerly all-white suburbs have become integrated, but now face the threat of resegregation as a result of

> "a complex mix of market forces. These market forces include racial prejudice: some whites and some blacks prefer to live in segregated communities; the belief that high concentrations of blacks result in a drop in home values; the expectation that an integrated community will eventually become segregated; and housing search practices that are reinforced by certain real estate practices."

South-Suburban Housing Center v. Greater South Suburban Board of Realtors, 713 F. Supp. 1068, 1074 (N.D. Ill. 1988). In order to stem the tide of these market forces and promote integrated housing patterns, the plaintiff, SSHC, "attempted to influence the housing market by encouraging the sales and marketing of real estate in what it terms to be 'non-traditional' ways, i.e., encouraging whites to move to black or integrated areas and blacks to move to white or integrated areas." *Id.* at 1075. A controversy between South-Suburban Housing Center and the Realtors over the propriety of SSHC making special efforts to market houses in black neighborhoods to white home buyers spawned the initial complaint in this litigation, which has resulted in the eight appeals consolidated herein.

The plaintiff, SSHC, is an Illinois, non-profit corporation whose "purposes are to 'promote and encourage multiracial communities in the South Suburbs' of Chicago and 'promote open housing to all people regardless of race.' " *Id.* at 1073. SSHC engages in a program of "affirmative marketing" of real estate, which "consists of race conscious efforts to promote integration or prevent segregation through special marketing of real estate to attract

persons of particular racial classifications who are not likely to either be aware of the availability or express an interest in the real estate without such special efforts." *Id.* at 1075.

The defendants/counterplaintiffs are two realtor trade associations, the Greater South Suburban Board of Realtors (GSSBR) and the National Association of Realtors (NAR). The GSSBR is an Illinois, non-profit corporation which is an organization of licensed real estate brokers and salesmen operating in the south suburbs of Chicago. One of GSSBR's activities is the operation of a multiple listing service (MLS) in the south suburbs. The district court described the MLS as follows:

> "[the] multiple listing service ('MLS') [is] a facility by which a MLS member broker makes a blanket unilateral offer of subagency to all other MLS participants with respect to a home listed with that broker. The MLS computer data base contains information about homes listed for sale with its members. MLS members and their home-seeking prospects can review this data via computer terminals or by reviewing printed compilations distributed to members on a bi-weekly basis."

Id. at 1077. The NAR is also an Illinois non-profit corporation and an organization of licensed real estate brokers that "provides policy guidance and materials and services of various sorts to its local affiliates, including the GSSBR." *Id.* at 1073.

The other litigants in this case are nine south suburban municipalities, the Cities of Blue Island and Country Club Hills and the Villages of Calumet Park, Glenwood, Hazel Crest, Matteson, Park Forest, Richton Park and University Park. These municipal defendants are parties to the suit as a result of ordinances they enacted either regulating real estate broker in-home solicitations or regulating the exhibition of real estate "for sale" signs. The Village of Park Forest also faces a legal challenge because of its alleged involvement with SSHC's efforts to "affirmatively market" to white individuals three homes South Suburban Housing Center purchased from Park Forest.

The facts of this case deal with the following: 1) concerns over affirmative marketing, 2) limitations on real estate broker solicitation and 3) restrictions on "for sale" signs.

A. Affirmative Marketing

This action originated as a result of the Realtors' reaction to South-Suburban Housing Center's attempts to promote a racial balance in the Village of Park Forest through making special efforts to interest white home buyers in property there. The current racial imbalance came about during the 1970s when many black families moved into an area in the northeast corner of the Village of Park Forest, Illinois known as the Eastgate subdivision. At the time of the 1980 census, the census block including the homes at issue here had become more than fifty-six percent black, more than double the black population of any other census block in the Eastgate subdivision. As a result of the area's reputation as "a black block," few white families were interested in buying property. The area became less attractive to home buyers as VA and FHA mortgage foreclosures led to abandoned homes and neighborhood blight. *See South-Suburban Housing Center*, 713 F. Supp. at 1076. In response to the problem of abandoned homes in the Eastgate subdivision, in 1982 the Village of Park Forest instituted a program of purchasing vacant or abandoned homes for rehabilitation and resale, including vacant homes at numbers 9, 15 and 26 Apache Street. SSHC submitted a proposal, which included affirmative marketing, to Park Forest for the acquisition, rehabilitation and resale of these three homes.

After the Park Forest Board of Trustees accepted the proposal and sold the homes to the South-Suburan Housing Center, the SSHC agreed to list the homes for sale with Century 21-Host Realty through one of its salesmen, William H. Motluck. The parties utilized a standard real estate contract form with the exception of provisions that Century 21-Host Realty was "to implement the affirmative marketing plan attached as appendix." In addition to securing a buyer, Century 21-Host Realty's receipt of

a commission was conditioned upon its "performance of the attached affirmative marketing plan."

The affirmative marketing plan (AMP) directed that the realtor "use its best efforts to attract minority and majority groups persons" to the particular Apache Street home, and stated that the SSHC and the Realtor "agree that white home seekers are not likely without special outreach efforts to be attracted to the Apache St. home." The AMP also provided that the Realtor would use "the following special outreach activities to attract white home seekers to the Apache Street home:

> A. Placement of advertisements in newspapers with a predominantly white circulation;
>
> B. Distribution of information to selected rental developments; and
>
> C. Distribution of information to selected employers."

The Plan also provided that "Realtor shall not take any action which prohibits, restricts, narrows or limits the housing choice of any client on the basis of race." Century 21 was further required to maintain "a list of all persons, by race, who are shown the Apache Street home . . . ."

The Realtors became involved when Century 21-Host Realty listed the Apache Street homes with GSSBR's multiple listing service. The AMP created a conflict between Century 21 salesperson William Motluck and the Realtors, as the Realtors believed it was inappropriate under the fair housing laws to affirmatively market homes to one particular race, in this instance whites, in the absence of prior discrimination. Motluck initially became aware of the problem when he received a letter from GSSBR asserting that its legal counsel was concerned with the legality of the affirmative marketing plan and furthermore that it was contrary to the voluntary affirmative marketing agreement entered into between HUD and the National Association of Realtors. Motluck upon being so advised asked for a copy of GSSBR's legal coun-

sel's opinion. Rather than forward a copy of the opinion, they sent Motluck a letter stating that the provision requiring advertising in newspapers with a predominantly white circulation "provides for racial steering and is in violation of current Federal law." The letter further opined that the data collection provisions of the AMP are "in direct violation of the Multiple Listing rules . . . [and] may constitute a combination in restraint of trade under the Sherman Anti[-]Trust Act."

On the basis of Century 21's agreement to implement the affirmative marketing plan, GSSBR's private Equal Opportunity Commission (EOC) voted to file a complaint against Motluck under Article 10 of the NAR's Code of Ethics[1] with the Professional Standards Committee of the Illinois Association of Realtors.

> "The EOC voted to file its complaint against Motluck because the Apache Street agreements called for 'special outreach . . . to whites rather than to minorities.' The EOC's position, based upon the HUD/NAR [voluntary affirmative marketing agreement], was that special outreach to white home seekers gave rise to a violation of Article 10."

South-Suburban Housing Center, 713 F. Supp. at 1078 (citations omitted). After conducting a hearing, the Professional Standards Committee determined that there was insufficient evidence to hold Motluck liable for a violation of Article 10, as, in the words of the counsel for the hearing panel, "the evidence produced at the hearing indicated that [in attempting to market the Apache Street homes, Motluck] did nothing other than he normally did in the operation of his office in processing the listing which he obtained conditioned upon the affirmative marketing plan."

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[1] Article 10 provides:

> "The Realtor shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The Realtor shall not be party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin."

After the EOC decided to file its complaint against Motluck, Robert Turpin, the person responsible for the administration of GSSBR's multiple listing service, withdrew the three Apache Street homes from the MLS. (Turpin was present at the EOC meeting). Subsequently, GSSBR proposed to condition the listing of the homes in its multiple listing service upon Century 21's and SSHC's agreement to indemnify GSSBR and its member realtors from damages, costs or attorneys' fees which might be incurred as a result of any legal proceedings that might result from the AMP. The Realtors' justification for the indemnification requirement was a belief that

> "the listings could lead to 'legal liability' or 'potential exposure' of the MLS or MLS participants under legal prohibitions against steering.
>
> "The justification advanced by defendants for thus conditioning MLS access for the Apache Street listings was [William] North's [then Senior Vice-President and General Counsel of NAR] asserted belief that the listings called for actions which 'likely' were racial steering and therefore could lead to 'legal liability' or 'potential exposure' for the MLS or MLS participants."

Id. at 1078-79. The court found that "this justification was made in good faith and was not a pretense for discrimination." *Id.* at 1079.

SSHC asserts that the Realtors' removal of the Apache Street properties from the multiple listing service as well as the decision to file a complaint against Motluck because of the AMP's requirement of directing special sales efforts toward white home buyers violated Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (the Fair Housing Act) in that it discriminated "on account of race." The district court concluded as a matter of law that the Realtors neither intended to discriminate against SSHC nor did their actions have a discriminatory effect. Thus, the court found no violation of the Fair Housing Act. *Id.* at 1079-80.

B. Anti-Solicitation Ordinances

The second major area of the parties' litigation concerned the propriety of municipal ordinances prohibiting real estate brokers from soliciting real estate listings from persons who had stated their unreceptiveness to receiving solicitations. The City of Country Club Hills and the Villages of Glenwood, Hazel Crest and Matteson, Illinois have enacted ordinances regulating realtor solicitation that are similar to one another.[2] The Hazel Crest ordinance reads as follows:

> "No person shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Hazel Crest Village Clerk that he does not desire to be so solicited.
>
> "The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants and shall publish the same as follows:
>
> A. By maintaining a copy of said list in the office of the Village of Hazel Crest Clerk and making it available for inspection;
>
> B. By furnishing a copy of said list annually to every real estate firm belonging to the local multiple-listing service;
>
> C. By furnishing a copy of said list upon request and payment of reproduction cost to any person having an interest in the sale or rental of any dwelling in the Village of Hazel Crest.
>
> "In addition, any owner or occupant of a dwelling may notify, in writing, any real estate agent that

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[2] The Village of Park Forest has also enacted an anti-solicitation ordinance, the provisions of which are addressed in footnote 7, *infra*.

such owner or occupant does not desire to be solicited. Upon such notice a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling."[3]

The ordinances of all four municipalities define "solicit" or "solicitation" as follows:

" 'Solicit' or 'solicitation' means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

"For purposes of this Ordinance the term 'solicit' or 'solicitation' shall not refer to communication carried out by means of print or electronic media of gen-

[3] A comparison of the anti-solicitation ordinances in the four south suburban municipalities of Country Club Hills, Glenwood, Hazel Crest and Matteson reveals that the Hazel Crest ordinance and the Matteson ordinance are virtually identical. The Country Club Hills ordinance is the same as the other ordinances except that it provides that the Clerk shall compile lists both alphabetically and by street address and that additions and deletions from the list sent annually to real estate agents shall be posted quarterly in the Country Club Hills City Hall. The Glenwood Ordinance is also similar to the other ordinances with the exception that it provides that additions and deletions from the no-solicitation list are mailed or delivered to real estate agents quarterly.

eral circulation, such as a newspaper, radio, television or the yellow pages."[4]

The ordinances of the four municipalities considered in this section closely resemble the State of Illinois' restrictions upon real estate brokers' solicitation of unwilling persons that are contained in Ill. Rev. Stat. ch. 38 § 70-51(d), whose constitutionality we sustained in *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988).[5] One difference be-

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[4] Matteson, Country Club Hills, Glenwood and Hazel Crest each adopted this definition as an amendment to their no-solicitation ordinances in 1986 or in 1987. The former, less specific definition of solicitation gave rise to legal challenges based upon vagueness. In *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 155 (7th Cir. 1990), we concluded that the former definition of solicitation contained in the Hazel Crest ordinance, that provided that solicitation was "any conduct by a real estate agent or any employee or agent thereof intended to induce the owner of a dwelling within the village to sell, rent or list the same for sale or rental," was unconstitutionally vague. We based this conclusion on the ordinance's "fail[ure] to clearly define whether the Penny Saver's real estate advertisements came within the realm of the definition [of solicitation]." *Id.* We made clear in *Penny Saver* that we were not construing the validity of the amended ordinance, noting that: "The amended Ordinance is presently under review by this Court in *South Suburban Housing Center v. Greater South Suburban Board of Realtors*, 713 F. Supp. 1068 (N.D. Ill. 1988), *appeal docketed*, Nos. 89-2115, 89-2112, 89-2123, and 89-2218 (7th Cir. argued Feb. 15, 1990), and we do not touch on its constitutionality in this decision." *Id.* at 153.

[5] The text of that statute reads as follows:

"It shall be unlawful for any person or corporation knowingly:

* * *

"(d) To solicit any owner of residential property to sell or list such residential property at any time after such person or corporation has noticed that such owner does not desire to sell such residential property. For the purpose of this subsection, notice must be provided as follows:

"(1) The notice may be given by the owner personally or by a third party in the owner's name, either in the form of an individual notice or a list, provided it complies with this subsection.

(Footnote continued on following page)

tween the ordinances of the four municipalities and the state statute is that the municipal ordinances call for the city or village not only to compile but also to publish the non-solicitation list. The other differences are that the municipal ordinances are more limited in that they specifically define "solicit or solicitation," restrict their application to types of contacts that occur in the home or a residence and provide for fines only.

The trial court found that the municipalities had two bases for their anti-solicitation ordinances. First, the ordinances are

> "based on the desire to protect residents from exposure to advertising because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. As with 'for sale' sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities."[6]

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[5] *continued*

> "(2) Such notice shall be explicit as to whether each owner on the notice seeks to avoid both solicitation for listing and sale, or only for listing, or only for sale, as well as the period of time for which any avoidance is desired. The notice shall be dated and either of the following shall apply: (A) each owner shall have signed the notice or (B) the person or entity preparing the notice shall provide an accompanying affidavit to the effect that all the names on the notice are, in fact, genuine as to the identity of the persons listed and that such persons have requested not to be solicited as indicated.
>
> "(3) The individual notice, or notice in the form of a list with the accompanying affidavit, shall be served personally or by certified or registered mail, return receipt requested."

[6] *South-Suburban Housing Center*, 713 F. Supp. at 1093. The trial court went on to find that: "Wide spread solicitation by real estate brokers and salesmen, similar to the 'for sale' sign proliferation, is widely perceived to be destabilizing to an integrated community. The anti-solicitation ordinances are designed to make solicitation more difficult and expensive." *Id.* at 1094 (citation omitted).

The second "purpose of the anti-solicitation ordinances is to provide a method for a resident to obtain a measure of privacy by avoiding annoying and intrusive inquiries about residential plans." *South-Suburban Housing Center*, 713 F. Supp. at 1094. Although the Realtors urge that the "no solicitation" ordinances violated the Fair Housing Act in that they had a discriminatory impact upon black individuals, the trial court stated that "the record is devoid of substantial evidence tending to show that the ordinances were intended to discriminate against blacks or any other racial group," or that the "ordinances have had a racially discriminating effect." *Id.* at 1094.

Shortly before trial each of the four municipalities involved sent almost identical letters to real estate brokers which stated that:

> "[T]he terms 'solicit' or 'solicitation' in the ordinance include any business or promotional communication by a real estate agent to a homeowner in his or her home which is not carried out by media of general circulation, and the Village will treat such a communication to a resident on the list as a violation of the Ordinance."[7]

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[7] Park Forest also has an ordinance providing for the village clerk to maintain and publish a list of those persons who did not desire solicitations. The major difference between the Park Forest ordinance and the remaining four ordinances is in its definition of "solicitation" which reads:

> "*Solicitation* means any conduct (excluding advertisement in newspapers, magazines or broadcast media of general circulation) designed or intended to induce the owner of any real property (as herein above defined) to sell, rent, exchange, convey, transfer or list for sale or rental such real property."

Although not identical to the definitions in the remaining ordinances, the district court observed that this definition was "substantially similar" to the definition contained in the amended ordinances of the other municipalities. Park Forest's status before us also differs from the other four municipalities in that it did not send a letter to realtors broadly defining the term "solicitation" to include even

(Footnote continued on following page)

The trial court held that this definition including every business communication "not carried out by media of general circulation" "despite the oridinances' requirement that a communication must be *intended to induce a sale or listing for sale*," rendered the ordinances constitutionally invalid: "The text of the ordinances provide insufficient warning that 'indirect' solicitation is prohibited and thus they are unconstitutionally vague." *Id.* at 1096 (emphasis original).

C. Real Estate For Sale Signs

Four municipalities in the south suburbs have enacted limitations on the display of real estate "for sale" signs. The City of Country Club Hills and the Villages of Matteson and Park Forest regulate the size of these signs. These three municipalities as well as the Village of University Park have enacted regulations on the number of "for sale" signs that may be displayed on a piece of real estate as well as the placement of the signs.

Each of the municipalities that regulate the size, number and placement of "for sale" signs states in the preamble or in the text of the ordinance that its purpose is to advance the aesthetics of the community. The district court made a factual finding that there was "little evidence that the sign regulations resulted in measurable lost income for realtors, that the regulations had a discriminatory impact on black home seekers, or that they denied access to housing to anyone." *South-Suburban Housing Center*, 713 F. Supp. at 1090-91. Thus, the court held that

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[7] *continued*
indirect soliciting through media of general circulation. The district court nonetheless found as a fact that each of the municipalities (apparently including Park Forest), "interpret their ordinances to ban all business communication mailed or delivered by real estate brokers, even if their intended purpose was only to generate good will, such as holiday calendars, birthday greetings, the sales of investment or vacation property, or to find buyers or referrals." *South-Suburban Housing Center*, 713 F. Supp. at 1094.

the ordinances do not violate the Fair Housing Act. The trial judge further rejected the Realtors' constitutional challenge to the ordinances on the basis that "they are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant governmental interest and they leave open ample alternative channels for communication of the information." *Id.* at 1093.

Country Club Hills is the only one of these municipalities that further requires that persons displaying a "for sale" sign obtain a city permit costing $60.00 for a six month period. The Realtors' claim is that this fee exceeds the costs of administering the City's regulations. Although neither the parties nor the district court cite to any specific dollar figures which are attributable to the administration and enforcement of the "for sale" sign permit program, the district court found that "[t]here was no evidence that the fees charged exceeded the administration costs." *Id.* at 1103.

In contrast to the other municipalities regulating real estate "for sale" signs, Glenwood, Illinois enacted an ordinance enforcing a ban on these signs in 1972. Prior to 1982 Glenwood ceased enforcing its sign ban as a result of the Supreme Court's decision in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), which sharply curtailed a municipality's ability to enforce a ban on "for sale" signs. In spite of the advice of Glenwood's village attorney that enforcement of a sign ban would be unconstitutional, Glenwood again decided to enforce its ordinance prohibiting "for sale" signs on March 1, 1984. On the advice of its counsel, Glenwood repealed its "for sale" sign ban just prior to trial. Even though the issue of Glenwood's enforcement of its ban on "for sale" signs was raised in the pleadings and was the subject of evidence introduced at trial, the district court failed to make specific findings of fact or conclusions of law regarding the issue. But, we hasten to point out that the Realtors failed to call this issue to the court's attention at trial much less challenge the lack of specific findings and conclusions of law in their post-trial motions in the district court.

II. THE REALTORS' CHALLENGE TO THE APACHE STREET AFFIRMATIVE MARKETING PLAN

The Realtors contend that SSHC and Park Forest violated the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution in initiating the affirmative marketing plan for the three Apache Street homes. The trial court held that the Realtors lacked standing to pursue the equal protection claim because the "equal protection claim . . . rest[s] on legal rights of minority home buyers rather than those of homesellers." *South-Suburban Housing Center*, 713 F. Supp. at 1089-90. The court reached the merits of the Realtors' Fair Housing Act challenge and held that neither SSHC nor Park Forest violated the Act during the marketing of the Apache Street homes.[8]

A. The Realtors' Standing

Park Forest contends that the court erred in concluding that the Realtors possessed standing to bring their Fair Housing Act claim, while the Realtors urge that the trial court erred in holding that they lacked standing to pursue their equal protection claim.

In *Penny Saver Publications, Inc. v. Village of Hazel Crest*, 905 F.2d 150, 154 (7th Cir. 1990), we observed that:

> "The first element of the standing inquiry that [a plaintiff] 'must satisfy in this Court is the "case" or "controversy" requirement of Art. III of the United States Constitution.' *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 955 (1983). The relevant inquiry for a case or controversy is to determine whether a plaintiff has shown an injury to himself that is likely to be redressed by a favorable

[8] Before the trial court, the Realtors also urged that Park Forest and SSHC violated 42 U.S.C. § 1982. The Realtors abandoned this claim on appeal.

> decision. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976)."

Indeed, other than the requirement that the purported injury must be "likely to be redressed by a favorable decision,"[9] injury in fact is the only requirement to achieve standing under the Fair Housing Act, for the United States Supreme Court has held that:

> " 'Congress intended standing under § 812 [of the Fair Housing Act] to extend to the full limits of Art. III' and . . . the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section. [*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 103, n.9 (1979)]. Thus, the sole requirement for standing to sue under § 812 is the Art. III minima of injury in fact: that the plaintiff alleged that as a result of the defendant's actions he has suffered 'a distinct and palpable injury,' *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975)."

Havens Realty Corp. v. Coleman, 455 U.S. 363, 372, 102 S. Ct. 1114, 1121 (1982).

The Realtors assert that they suffered an injury in fact based upon their role as the representative of the individual interests of their member realtors. As this case demonstrates, the Realtors have interpreted the AMP as applied to the Apache Street homes to be in violation of the fair housing obligations and the Realtors' code of ethics. Thus, the threat of professional discipline inhibits member realtors from handling the listings involved. We are convinced that as organizations responsible for advancing both the professional ethics and the economic well being of the individual realtors, the Realtors have suffered an injury

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[9] Park Forest has not challenged the redressability of the Realtors' alleged injury. Furthermore, if the Realtors were to receive a favorable decision from this court, the injuries of which they complain would be removed.

in fact as a result of the damage occurring to member realtors from their inability to handle the Apache Street listings. Thus, under *Havens*, the Realtors' assertion of a redressible "injury in fact" is sufficient to provide them with standing to pursue their Fair Housing Act claim. *Accord Gorski v. Troy*, No. 89-3675, slip op. at 10-11 (7th Cir. April 11, 1991) ("Congress intended standing under the FHA 'to extend to the full limits of Art. III . . . .' " (Quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 103 n.9)).

In addition to demonstrating "injury in fact," the Realtors must also satisfy prudential standing concerns in order to pursue their claim based upon the equal protection rights of potential black home buyers.

> "When a person or entity seeks standing to advance the constitutional rights of others, we ask two questions: first, has the litigant suffered some injury in fact, adequate to satisfy Article III's case-or-controversy requirement; and second, do prudential considerations which we have identified in our prior cases point to permitting the litigant to advance the claim?"

Caplin & Drysdale, Chartered v. United States, 109 S. Ct. 2646, 2651 n.3 (1989).

The trial judge concluded that the Realtors lacked standing to litigate the equal protection claims because "[a]n equal protection claim would clearly rest on legal rights of minority home buyers rather than those of home sellers." *South-Suburban Housing Center*, 713 F. Supp. at 1089-90. Upon our examination of the Realtors' equal protection contentions, we are convinced that the rights asserted in the complaint can only be classified as those of minority home buyers rather than those of the Realtors themselves in that the claim is phrased in language which states that the affirmative marketing plan violates the equal protection rights of potential minority home buyers. Thus, the Realtors are without standing to pursue this alleged injury to minority home buyers unless the Realtors fall somehow within an exception to the prudential rule against third-party standing.

The Supreme Court has recognized that the prudential rule against standing to assert the constitutional rights of third persons, "[l]ike any general rule . . . should not be applied where its underlying justifications are absent." *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S. Ct. 2868, 2874 (1976) (plurality opinion). In determining third-party standing courts are to consider "the relationship of the litigant to the person whose rights are being asserted; the ability of the person to advance his own rights; and the impact of the litigation on third-party interests." *Caplin & Drysdale, Chartered*, 109 S. Ct. at 2651 n.3.

In examining the relationship between the Realtor litigants and the potential black home buyers whose rights they seek to vindicate, we must examine "whether the enjoyment of the [potential home buyer's] right is inextricably bound up with the activity the litigant wishes to pursue." *Singleton*, 428 U.S. at 114, 96 S. Ct. at 2874 (plurality opinion). Unlike *Caplin & Drysdale*, where the attorney's right to a fee was bound up with a specific client's claim that forfeiture of his assets interfered with his Sixth Amendment right to counsel, or *Singleton*, where the physician's interest in payment for his abortion services was closely associated with the patient's alleged right to government payment for an abortion, the Realtors have failed to demonstrate a true relationship between their interest in pursuing particular real estate marketing practices and the constitutional rights of specific potential black home buyers. *Cf. Rothner v. City of Chicago*, No. 89-3614, slip op. at 7-8 (7th Cir. April 1, 1991) (permitting distributor and operator of video games to pursue alleged First Amendment challenge of ordinance prohibiting minors from playing video games between 8:00 a.m. and 3:00 p.m. on days when the city's schools are in session). Indeed the record clearly establishes that the Realtors have been unable to point to a single minority home buyer who was deprived of his or her equal protection rights as a result of the Apache Street affirmative marketing plan. *See South-Suburban Housing Center*, 713 F. Supp. at 1088 ("[Realtors] offered no evidence respecting any persons who sought

to purchase or rent homes and who were denied that right by the SSHC, or that the SSHC denied or made housing available to anyone, or in any way restricted or limited anyone's housing choice . . . .").

The relationship between the Realtors and black home buyers does not reflect the similarity in interest which would lead to the conclusion that "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the [constitutional] right as the latter." *Singleton*, 428 U.S. at 115, 96 S. Ct. at 2874 (plurality opinion). Although the Realtors have a strong philosophical commitment to a housing market in which equal opportunity is realized solely through "color blind" marketing, since no potential black home buyers are involved in this suit, it is unclear as to whether their priorities are similar. One of the prudential reasons for the rule against third party standing is that "the courts should not adjudicate [constitutional] rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not." *Singleton*, 428 U.S. at 113-14, 96 S. Ct. at 2874 (plurality opinion). We refuse to address the constitutional issue of an equal protection violation until such time as it is presented by a potential home buyer, as we, like the Supreme Court, believe that "third parties themselves usually will be the best proponents of their own rights." *Singleton*, 428 U.S. at 114, 96 S. Ct. at 2874 (plurality opinion).

The second potential exception to the rule against third party standing turns upon the "ability of the [third party] to advance his own rights,"[10] and whether "there is some genuine obstacle to [the personal] assertion"[11] of the constitutional right. We are unable to discern anything in the record that would prevent black home buyers from filing a constitutional challenge to an affirmative market-

[10] *Caplin & Drysdale*, 109 S. Ct. at 2651 n.3.

[11] *Singleton*, 428 U.S. at 116, 96 S. Ct. at 2875 (plurality opinion).

ing program directed toward white home buyers. Thus, the exception relating to third parties who are unable to effectively assert their own rights fails to aid the Realtors in their quest for standing to assert their equal protection claim.

The final factor considered in determining whether an exception to the rule against third party standing is warranted is "the impact of the litigation on third-party interests." *Caplin & Drysdale*, 109 S. Ct. at 2651 n.3. Based on the record before us, we are not in a position to determine whether potential black home buyers would desire the Apache Street AMP to be invalidated, thereby decreasing competition from white home buyers for these properties; nor are we able to ascertain whether they would want the affirmative marketing plan upheld in order to promote developing and maintaining an integrated community in Park Forest. Hence, we are unconvinced that allowing the Realtors to assert the equal protection claim would, in fact, further the interests of potential black home buyers.

We conclude that while the Realtors have fulfilled the injury in fact requirement for bringing their Fair Housing Act challenge to the Apache Street affirmative marketing program, they have failed to overcome the prudential limitations on standing that preclude them from asserting the equal protection-based constitutional claims of black home buyers.

B. Mootness

Both Park Forest and SSHC urge that the 1985 sale of the three Apache Street homes has rendered moot the Realtors' Fair Housing Act challenge to the Apache Street affirmative marketing plan.[12] The Realtors' Fair Housing

[12] Although the homes were sold prior to trial, Park Forest and SSHC for some reason did not raise their mootness challenge in the district court. Because a moot action does not satisfy the case or controversy requirement of Article III of the Constitution, *see*

(Footnote continued on following page)

Act challenge to the Apache Street Plan requests damages and declaratory relief in addition to injunctive relief. In *Penny Saver*, we held that although a subsequent development (amendment of a challenged ordinance) had rendered a request for injunctive relief moot:

> "This is not to say that Penny Saver's entire action is moot. Rather, Penny Saver still has a viable claim for declaratory and monetary relief. The fact that the Ordinance has been amended subsequent to the commencement of this case 'does not moot plaintiff's claim for either declaratory or monetary relief.' *Black v. Brown*, 513 F.2d 652 (7th Cir. 1975) (new regulations adopted by prison officials do not moot declaratory or monetary claim on the original regulations). As the Supreme Court concluded in *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 713 (1989), the expiration of an ordinance does not render the controversy moot because there still remains a live controversy between the parties as to whether the ordinance was unlawful thus entitling the plaintiff to damages. The Court has also previously stated 'that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.' *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). *See also Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8-9 (1978) (respondent's claim for actual and punitive damages arising from termination of service saves this cause from the bar of mootness); *Powell v. McCormack*, 395 U.S. 486, 499 (1969) ('A court may grant declaratory relief even though it chooses not to issue an injunction' because that claim is moot.)"

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[12] *continued*
Air Line Pilots Association, Int'l v. UAL Corp., 897 F.2d 1394, 1396-97 (7th Cir. 1990), the mootness claim is a "nonwaivable question of subject matter jurisdiction . . . ." *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990) (Article III-based standing issue). Thus, mootness may properly be asserted on appeal.

905 F.2d at 153. Hence, the Village's amendment of its ordinance after the suit had been filed failed to invalidate Penny Saver's claims. Likewise, the sale of the three Apache Street homes after the initiation of this case fails to moot the Realtors' claims for damages. Thus, the Realtors' action is not moot, and a case or controversy exists over which we may properly exercise subject matter jurisdiction.

C. The Realtors' Fair Housing Act Claims

The Realtors allege that SSHC and Park Forest violated sections 804(a) and 804(c) of the Fair Housing Act, 42 U.S.C. § 3604(a) and (c), in promulgating and implementing the Apache Street affirmative marketing plan. These sections provide as follows:

> "As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> "(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> * * *
>
> "(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination."

The trial court determined that SSHC and Park Forest did not violate the Fair Housing Act in their implementation of the Apache Street Plan. *See South-Suburban Housing Center*, 713 F. Supp. at 1087-88.

1. 42 U.S.C. § 3604(a)

We turn to the Realtors' claim that SSHC and Park Forest violated 42 U.S.C. § 3604(a), which prohibits the "refus[al] to sell or rent . . . or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin." The Fair Housing Act is concerned with both the furtherance of equal housing opportunity and the elimination of segregated housing. As we observed in *Southend Neighborhood Improvement Association v. County of St. Clair*, 743 F.2d 1207, 1209-10 (7th Cir. 1984):

> "The Fair Housing Act prohibits both direct discrimination and practices with significant discriminatory effects. For example, although Section 3604(a) applies principally to the sale or rental of dwellings, courts have construed the phrase 'otherwise make unavailable or deny' in subsection (a) to encompass mortgage 'redlining,' insurance redlining, racial steering, exclusionary zoning decisions, and other actions by individuals or governmental units which directly affect the availability of housing to minorities. Of course, *the alleged illegal actions must lead to discriminatory effects on the availability of housing. The Act is concerned with ending racially segregated housing. Section 3604(a) applies to the availability of housing.* That section thus is violated by discriminatory actions, or certain actions with discriminatory effects, that affect the availability of housing."

(Emphasis added) (footnote and citations omitted). The Realtors argue that the affirmative marketing plan furthers the goal of "ending racially segregated housing" at the expense of limiting the "availability of housing" for black people. They assert that this alleged subordination of equal housing opportunity to the goal of integration is invalid, just as the courts held in *United States v. Starrett City Associates*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 488 U.S. 946 (1988), and *United States v. Charlottesville Redevelopment and Housing Authority*, 718 F. Supp. 461 (W.D. Va. 1989). In *Starrett City*, owners of a government

subsidized housing development sought to maintain an ethnic distribution of tenants in their project consisting of sixty-four percent white persons, twenty-two percent black persons and eight percent hispanic persons through a "tenanting procedure" that filled apartment vacancies with "applicants of a race or national origin similar to that of the departing tenant . . . ." 840 F.2d at 1098. In *Charlottesville*, a "tenant selection policy . . . gave preferential treatment to white applicants for public housing," based upon an intent to "achieve a 50/50 mix of black and white residents in . . . public housing." 718 F. Supp. at 462. The courts determined that each of these "quota" programs violated the Fair Housing Act. In *Charlottesville*, the court recognized that the Fair Housing Act's twin purposes of eliminating discrimination in housing and furthering integration in housing are both important, but may occasionally be incompatible:

> "The legislative history of the Fair Housing Act suggests to this court that the prime focus or the 'quickening' force behind that legislation is prohibition of discrimination in the provision of housing, but also that integration was seen by the creators of that legislation as a prominent goal and a value of great worth. From the perspective of over two decades, it is perhaps excusable to find the unexamined assumption in the Act's legislative history that the principles of nondiscrimination and integration will always necessarily go hand in hand. With our later perspective, that assumption may be unfounded, but it does not detract from the observation that this legislation was created with both legal (and moral) principles in mind, although primary weight is given to the prohibition of discrimination. However, cases such as *Trafficante* [*v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)] illustrate that the legal principle of integration and concern for the achievement of that goal cannot be considered mere surplusage."

718 F. Supp. at 467. The court determined that Charlottesville's "quota" program presented a conflict between the

Act's purposes of nondiscrimination and integration, and held that:

> "In the present conflict between these two legal principles, nondiscrimination and integration, the obligation of [the Charlottesville Redevelopment and Housing Authority (CRHA)] to avoid discrimination must 'trump' CRHA's obligation to promote integration, as regards the promotion of integration through the specific policy mechanism and controversy before this court. It is not that this court ascribes to integration a status inferior to nondiscrimination in the pantheon of legal values. It is, rather, that the duty to avoid discrimination must circumscribe the specific particular ways in which a party under the duty to integrate can seek to fulfill that second duty."

718 F. Supp. at 468. Similarly, the Second Circuit in *Starrett City* held that while integration maintenance with its concern over

> "the 'white flight' phenomenon may be a factor 'take[n] into account in the integration equation,' *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 720 (2d Cir. 1979), it cannot serve to justify attempts to maintain integration at Starrett City through inflexible racial quotas that are neither temporary in nature nor used to remedy past racial discrimination or imbalance within the complex."

Starrett City, 840 F.2d at 1102. Thus, *Starrett City* and *Charlottesville* both mandate the conclusion that an interest in racial integration alone is insufficient to justify a racial quota system which favors whites and thereby lessens housing opportunities for minorities.

In contrast to the subordination of the goal of equal housing opportunity to the goal of integration presented by the facts in *Starrett City* and *Charlottesville*, the Realtors' challenge to the Apache Street affirmative marketing plan presents the question of whether a real estate organization may engage in limited race conscious marketing which does not exclude minorities from housing opportu-

nities. Thus, we are not dealing with conflicting goals, for the affirmative marketing plan furthers the goal of integration while providing equal opportunities to all.

Essentially, the Realtors' contention is that the AMP constitutes invalid "steering" of blacks from Park Forest in that it "deterred blacks from buying on Apache Street and in Park Forest generally by directing essential information about housing availability away from blacks and towards whites, and by stigmatizing black residents and home seekers." This Court has not previously addressed the question of whether an attempt to interest white homeowners in property located in an area of predominant interest to black home buyers constitutes "steering" violative of the Fair Housing Act. However, we recently addressed the analysis applicable to an allegation of more traditional, non-benign "steering" in *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1529-30 (7th Cir. 1990):

> "The mental element required in a steering case is the same as that required in employment discrimination cases challenged either under Title VII of the Civil Rights Act of 1964 (and section 3604 is part of the same Act) or under 42 U.S.C. § 1981 (the standard of liability in which is similar to that in Title VII, *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1420 (7th Cir. 1986)) on a theory of disparate treatment. 'Disparate treatment' means treating a person differently because of his race; it implies consciousness of race, and a purpose to use race as a decision-making tool. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 97 S.Ct. 1843, 1854-55 n.15, 52 L.Ed.2d 396 (1977). 'Proof of discriminatory motive is critical' in a Title VII disparate treatment case, 'although it can in some situations be inferred from the mere fact of differences in treatment.' *Id.*"

In analyzing the question of whether directing information to predominantly white audiences concerning the Apache Street homes violates the Fair Housing Act, we must rec-

ognize that these homes likely would have been primarily of interest to black home buyers. But SSHC's affirmative marketing plan in no way deters black home buyers from pursuing their interest in the Apache Street homes; it merely creates additional competition in the housing market. If the AMP resulted in realtors "refusing to show properties because of the race of the *customer*, or misleading the *customer* about the availability of properties because of his race, or cajoling or coercing the *customer* because of his race to buy this property or that or look in this community rather than that," *id.* at 1530, we would agree that racial steering may possibly have been involved. In the absence of concrete evidence of this nature, however, we see nothing wrong with SSHC attempting to attract white persons to housing opportunities they might not ordinarily know about and thus choose to pursue.

The district court explicitly found that:

> "The SSHC's stated purpose in entering into and implementing the Apache Street listings was to add some 'white traffic to the properties in addition to the black traffic,' not to decrease or restrict the black traffic. The relevant evidence supports a finding that that was in fact the SSHC's purpose."

South-Suburban Housing Center, 713 F. Supp. at 1085. With respect to the ultimate factual finding of whether the Realtors had proven intentional discrimination, the trial court found:

> "Since counterplaintiffs offered no evidence respecting any persons who sought to purchase or rent homes and who were denied that right by the SSHC, or that the SSHC denied or made housing available to anyone, or in any way restricted or limited anyone's housing choice, the court concludes that the counterplaintiffs have failed to prove an 'intent' case under the Fair Housing Act."

Id. at 1088. The record contains neither cases of particular adversely affected black home buyers nor statistical evi-

dence that would lead us to conclude that the trial court's finding of an absence of intentional discrimination was clearly erroneous.

In addition to furthering the Fair Housing Act's goal of integration, we are of the opinion that the AMP also advances the purpose of the Act through making housing equally available to all by stimulating interest among a broader range of buyers. Furthermore, this marketing may simply be a wise business move in that it stimulates interest in housing among new and/or potential customers. We disagree with the Realtors' argument that increased competition among black and white home buyers for the same homes constitutes a violation of the Fair Housing Act. Instead, this is precisely the type of robust multiracial market activity which the Fair Housing Act intends to stimulate. Because the Apache Street affirmative marketing plan merely provided additional information to white home buyers concerning properties they might not ordinarily know about nor consider, and involved no lessening of efforts to attract black home buyers to these same properties, we conclude that the plan was not in violation of 42 U.S.C. § 3604(a).[13]

2. 42 U.S.C. § 3604(c)

The Realtors go on to argue that SSHC and Park Forest violated 42 U.S.C. § 3604(c) because the promulgation of the Apache Street AMP constituted the publication of a statement indicating a preference based on race or color or an intention to make such a preference. As discussed

[13] We would also note that there was some evidence in the record that, as a result of the problems arising from the litigation involving the AMP, William Motluck of Century 21-Host Realty was unable to carry out the provisions of the affirmative marketing plan and, thus, did nothing other than what he would have ordinarily done in marketing the Apache Street homes. Obviously, if this is true, there is no basis to conclude that the implementation of the Apache Street AMP violated 42 U.S.C. § 3604(a).

previously, the Apache Street AMP merely directs additional promotional and advertising toward a racial group that would normally have little interest in the respective homes. It contains no racial quota or other provision purporting to make race a factor in a decision concerning who would be permitted to see or purchase the Apache Street homes. Thus, we are of the opinion that the Apache Street plan was not an improper statement of racial preference under 42 U.S.C. § 3604(c).

III. SSHC's CHALLENGE TO THE REALTORS' CONDUCT RESPONDING TO THE APACHE STREET AFFIRMATIVE MARKETING PLAN

SSHC appeals from the trial court's conclusions of law that 1) the Realtors did not violate 42 U.S.C. § 3606 when they initially excluded the Apache Street homes from the GSSBR multiple listing service and later required indemnification as a pre-condition to the inclusion of the listings, and 2) that the Realtors did not transgress 42 U.S.C. § 3617 as a result of the above behavior together with the disciplinary proceedings commenced against William Motluck, the real estate broker who attempted to sell the Apache Street homes.[14]

A. 42 U.S.C. § 3606

Section 806 of the Fair Housing Act, 42 U.S.C. § 3606, provides that:

> "After December 31, 1968, it shall be unlawful to deny any person access to or membership or participation in any multiple-listing service, real estate brokers' organization or other service, organization, or

[14] In the trial court, SSHC also challenged the Realtors' practices under 42 U.S.C. § 3604(a) and under state tort law theories. Because SSHC did not raise these claims on appeal, we deem them to be abandoned.

> facility relating to the business of selling or renting dwellings, or to discriminate against him in the terms or conditions of such access, membership, or participation, on account of race, color, religion, sex, or national origin."

SSHC contends that the Realtors (GSSBR and NAR) denied or conditioned access to GSSBR's multiple listing service "on account of race" because their conduct was based upon the fact that SSHC's affirmative marketing plan pertaining to the Apache Street homes constituted a special outreach to white home buyers. The trial court rejected SSHC's argument, finding that the Realtors' initial exclusion of the Apache Street homes from the MLS and the later requirement for indemnification as a condition for listing the homes were made in good faith based upon concerns that the Apache Street AMP constituted racial steering which was illegal and could result in potential liability for the multiple listing service or the MLS participants. *See South-Suburban Housing Center*, 713 F. Supp. at 1078-79. SSHC contends that these justifications are discriminatory by their very nature.

The question presented is whether the Realtors acted "on account of race," when they restricted access to the multiple listing service. Because SSHC has argued this case on a "disparate treatment," or "intentional discrimination," theory, our task is to determine whether the trial court's finding that the exclusion of the SSHC's properties was not made "on account of race" is free from clear error. *Cf. Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (holding that question of intentional discrimination under Title VII of the Civil Rights Act is a factual question subject to the "clearly erroneous" standard of review). In reviewing the question of whether the Realtors restricted access to GSSBR's multiple listing service "on account of race," we are without legal precedent to guide us, for no case law has been cited for us nor to our knowledge is there any. Thus, this is a case of first impression construing this section of the Fair Housing Act.

SSHC essentially claims that the Realtors excluded them from the multiple listing service because they sought to market their properties to white persons. We have previously determined that the Fair Housing Act permits SSHC to implement an affirmative marketing plan directed toward interested white persons concerning properties they would not ordinarily consider. But, the mere fact that the Fair Housing Act may permit SSHC to affirmatively market its properties to potential white customers falls short of *requiring* that a realtor adopt this sales practice rather than a color-blind marketing scheme. As we held in *Village of Bellwood*, a broker who engages in color-blind marketing and

> "responds to the customer's desires, is not discriminating against the *customer*, or denying the *customer* a dwelling, or misrepresenting to the *customer* the unavailability of a dwelling. The statute . . . does not impose liability for failing to promote integration, or for failing to coordinate individual integrative acts that have an aggregate resegregative effect. If the broker treats all his customers the same, regardless of race, he is not liable."

Village of Bellwood, 895 F.2d at 1531. We cannot understand how a color-blind marketing policy could possibly constitute discrimination "on account of race," nor can we fathom how the facts set forth in this record could be construed as establishing discrimination. Quite simply, the Fair Housing Act permits an AMP but does not require the Realtors or any other party to promulgate an affirmative marketing plan or to cooperate in another entity's implementation of such a plan. Thus, we are convinced that the Realtors did not violate 42 U.S.C. § 3606 when they excluded the listings of the Apache Street homes from the MLS and later conditioned participation in the MLS on indemnification against potential legal action.

B. 42 U.S.C. § 3617

SSHC goes on to argue that the exclusion of its listings from GSSBR's multiple listing service, together with the Realtors' initiation of disciplinary proceedings against Motluck, interfered with SSHC's attempts to inform white persons of housing opportunities in violation of 42 U.S.C. § 3617. 42 U.S.C. § 3617 provides:

> "It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title. This section may be enforced by appropriate civil action."

SSHC argues that section 3617 provides for a cause of action for interfering with the enjoyment of fair housing rights that is independent of violations of the enumerated sections, but as the trial court held, the "section does not under the circumstances of this case provide an independent ground for liability." *South-Suburban Housing Center*, 713 F. Supp. at 1080. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1288 n.5 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978), we declined to decide whether "a violation of section 3617 can be established without first establishing a violation of sections 3603, 3604, 3605, or 3606," but we held

> "that under the circumstances of this case, where the conduct that allegedly violated section 3617 is the same conduct that allegedly violated section 3604(a) and was engaged in by the same party, the validity of the section 3617 claim depends upon whether the [conduct] violated section 3604(a)."

Id. The same reasoning is apropos here, since the conduct SSHC alleges violated section 3617 is the same conduct that we refused to hold violative of section 3606 above.

Thus, we agree with the trial court's finding that SSHC has failed to demonstrate interference with the aiding or encouraging of other persons in the exercise of rights under the Fair Housing Act. As previously discussed, the Fair Housing Act guarantees to all regardless of race, color or creed the right to equal treatment, not to preferential treatment. The Realtors never interfered with much less opposed white persons learning about, seeing or purchasing the Apache Street homes on an equal basis with black persons. They simply disagreed with the special outreach efforts to white persons that SSHC included in its AMP. Because the Realtors' conduct in limiting access to GSSBR's multiple listing service and in attempting to enforce their disciplinary rules against William Motluck do not limit SSHC's ability to "aid[ ] or encourgage" white persons in their right to enjoy equal treatment in the housing market, the Realtors have complied with the mandates of 42 U.S.C. § 3617.

IV. THE REALTORS' CHALLENGE TO THE MUNICIPALITIES' RESTRICTIONS ON SOLICITATION

The trial court concluded that the non-solicitation ordinances of the City of Country Club Hills and the Villages of Glenwood, Hazel Crest, Matteson and Park Forest violated the First Amendment to the United States Constitution insofar as they could be construed to "prohibit the mailing of mere promotional material from Realtors." *South-Suburban Housing Center*, 713 F. Supp. at 1095. The district court further determined that the ordinances were unconstitutionally vague because "despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale*," the municipality "believe[s] *every* 'business communication' from a real estate broker is a solicitation to list or sell . . . ." *Id.* at 1096 (emphasis in original). The court went on to find that the language of the ordinance thus "provide[s] insufficient warning that 'indirect' solicitation is prohibited . . . ." *Id.* Notwithstanding the constitutional defect, the trial court

found that the ordinances did not violate the Fair Housing Act, since "there was no substantial showing that the solicitation ordinances have a disparate impact on blacks and . . . there is no evidence of discriminatory intent with regard to the solicitation ordinance[s] . . . ." *Id.* at 1095. The Realtors appeal from the Fair Housing Act finding while the municipalities appeal the constitutional rulings.

A. Solicitation Restrictions under the Fair Housing Act

The Realtors assert that because the trial court found that "the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of home seekers to find homes in the municipalities," *Id.* at 1093, they had the purpose and effect of making housing unavailable to blacks on account of their race. The Realtors contend that when the purpose of "keep[ing] residents from moving" is considered in light of the predominantly white population of the municipalities with anti-solicitation ordinances and the fact that many homeseekers are black, the anti-solicitation ordinances are discriminatory both in intent and in effect.

With respect to the Realtors' complaint that the ordinances were intended to discriminate against blacks, the trial court concluded that "the record is devoid of substantial evidence tending to show that the ordinances were intended to discriminate against blacks or any other racial group." *Id.* at 1094. We agree that the Realtors have pointed to nothing in the record that would even remotely demonstrate that the purpose of these facially neutral limitations on solicitation was to cause blacks to suffer racial discrimination.

The heart of the Realtors' Fair Housing Act challenge to these ordinances is that they had the racially discriminatory effect of preventing black home seekers from finding homes in the municipalities. However, the trial court concluded that:

> "[T]here is no substantial evidence tending to show that the solicitation ordinances have had a racially discriminatory effect. The purpose of the ordinance is to bar from solicitation only those who request it. Therefore the only families barred from receiving solicitations are precisely those who are least likely to offer their homes for sale anyway—families (black and white, newcomers and oldcomers) who have affirmatively indicated that they are not interested in moving or selling or listing their homes and do not want to be bothered by real estate salesmen looking for business. The solicitation ordinances are facially neutral and nondiscriminatory as to race and the evidence failed to establish that they are otherwise with regard to effect or result."

Id. at 1094-95.[15]

In our opinion the trial court's analysis of this issue is persuasive. In particular, we believe it is significant that "the only families barred from receiving solicitations are precisely those who are least likely to offer their homes for sale anyway . . . ." *Id.* at 1094. Consequently, any effect upon the sale of homes will be minimal because the only persons who cannot be contacted under the ordinances are those who have requested that their privacy not be disturbed and thus are not interested in receiving real estate solicitations.[16] In our opinion, the

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[15] The trial court then went on to specifically apply the test for determining whether a practice's effects result in discrimination set forth in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d at 1290, and found that the ordinances were not racially discriminatory.

[16] We are unconvinced that the alleged problems the realtors may have with the deletion of names from mailing lists are a proper basis for holding that real estate activity is impeded. We believe interests in privacy are significant and important enough to require deletion of uninterested parties from mailing lists as a simple cost of doing business.

minimal effect the solicitation restrictions impose upon real estate activity causes no discernable discriminatory effect on the potential home buying public, even if it is predominantly black. Thus, the municipalities' limitations on Realtors' solicitation do not violate the Fair Housing Act.

B. Solicitation Restrictions under the First Amendment

As we turn to the district court's invalidation of the municipalities' solicitation restrictions on First Amendment grounds, we begin by noting a discrepancy between the trial court's disposition and our decision in *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir. 1988). In *Curtis* we rejected a real estate broker's constitutionally based attempt to obtain a preliminary injunction against the Illinois state non-solicitation statute, which is comparable to the municipal ordinances at issue here.[17] The similarity between the municipal ordinances at issue in this case and the state statute involved in *Curtis* might certainly lead us to expect that our holding in *Curtis* would control the outcome here.

An examination of *Curtis* reveals that our affirmance of the district court's rejection of the real estate broker's request for a preliminary injunction against the Illinois real estate solicitation statute was based upon the broker's failure to demonstrate a "better than negligible chance of success" on the question of the statute's constitutional invalidity. *Curtis*, 840 F.2d at 1296 n.5. We began our

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[17] *See supra* note 5 for the text of the Illinois statute, Ill. Rev. Stat. ch. 38 § 70-51(d). The state statute is slightly broader than the municipal ordinances in that the statute bans all real estate solicitation of individuals who had provided a non-solicitation request while the municipal ordinances only prohibit solicitation in the home. The municipal ordinances are also a bit more specific than the state statute in that they set up a procedure whereby the involved municipality compiles a non-solicitation list while the state statute merely prescribed methods for developing such lists without providing that the state would compile the list.

First Amendment analysis with the recognition that "the speech in which Curtis wishes to engage is primarily aimed at proposing a commercial transaction, and should thus be classified as 'commercial speech.' " 840 F.2d at 1297 (citing *Bolger v. Young's Drug Products Corp.*, 463 U.S. 60 (1983)). While we recognized that the ban on real estate solicitation was "content based," 840 F.2d at 1297, we noted the flexibility the Constitution permits a sovereign state in enacting content-based regulations on commercial speech:

> "In the area of non-commercial speech, content-based restrictions (such as the one at hand) are sustained only in the most extraordinary circumstances: 'The First Amendment forbids the government from regulating speech in ways that favor some viewpoints or ideas at the expense of others.' [*Members of the City Council v.*] *Taxpayers for Vincent*, [466 U.S. 789, 804 (1984)]. This is because such 'core' First Amendment speech has always been considered essential to our survival as a democratic society: 'Free speech concerning public affairs is more than self-expression; it is the essence of self-government.' *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-16, 13 L.Ed.2d 125 (1964). By contrast, regulation of commercial speech based upon content is less problematic. Because of the greater potential for deception or invasions of privacy in the context of some advertising methods, content-based restrictions on commercial speech are more often upheld."

Curtis, 840 F.2d at 1297-98 (citations omitted).

We went on to apply the four-part test for determining the validity of a restriction on commercial speech contained in *Central Hudson Gas and Electric Corp. v. Public Service Commission*, 447 U.S. 557, 100 S. Ct. 2343 (1980), commencing with the following quotation from *Central Hudson*:

> "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within the provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

447 U.S. at 566, 100 S. Ct. at 2351. Applying the *Central Hudson* test, we initially determined that Curtis' speech was protected as it "concerns lawful activity and is not misleading." *Curtis*, 840 F.2d at 1298. In analyzing the interest involved, we noted the real estate broker's argument that the statute did not directly advance the state's interest in preventing inducements to sell real estate through appeals to fear of racial integration. But we refused to give these arguments controlling weight:

> "Curtis raises an interesting question when she questions whether the regulation does advance the government's interest in a meaningful way to prevent blockbusting, but this argument ignores another overriding interest the state of Illinois argues is served by the statute: the interest in insuring the privacy of the homeowner. In our view, that interest is more than sufficient to justify the limited curtailment of Curtis' right to speak to citizens in their homes.
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> * * *
>
> "Unquestionably, Illinois' interest in ensuring the privacy of its residents while they are at home is strong and valid, even in the face of the First Amendment. The right to privacy sets America apart from totalitarian states in which the interests of the state prevail over individual rights; moreover, the unique importance of the right to privacy *in the home* has,

> from time immemorial, been amply demonstrated in our constitutional jurisprudence. As early as 1886, the United States Supreme Court recognized that the Fifth Amendment protects against all governmental invasions 'of the sanctity of a man's home and the privacies of life.' *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 532, 29 L.Ed. 746 (1886). The First Amendment has been held to encompass the right to 'privacy and freedom of association in the home.' *Moreno v. United States Dep't of Agriculture*, 345 F. Supp. 310, 314 (D.D.C. 1972), *aff'd*, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)."

Curtis, 840 F.2d at 1299 (emphasis original). Furthermore, we said that "[w]hen the fundamental right to privacy clashes with the right of free expression, the interest in privacy does not play second fiddle when the speech is merely intended to propose a commercial transaction." *Id.* at 1300 (footnote omitted). We compared the Illinois statute to the federal statute involved in *Rowan v. United States Post Office Department*, 397 U.S. 728, 90 S. Ct. 1484 (1970), stating: "As in *Rowan*, the Illinois statute in this case circumscribes the mailer's right to communicate only by the addressee's taking affirmative action and giving notice to the mailer that he wishes no further mailings from his enterprise." *Curtis*, 840 F.2d at 1301. Applying the *Central Hudson* requirement of advancing the governmental interest, we held that:

> "Contrary to Curtis' argument, the regulation in issue meets the *Central Hudson* test because it directly advances the goal of insuring privacy in the home. As was the case in *Rowan*, once a homeowner expresses his or her desire not to receive certain types of literature he or she determines to be objectionable, there simply is no further right to press those ideas on the unwilling recipient . . . ."

Id. at 1302 (footnote omitted).

Based upon the above analysis, we formulated the following holding to explain why the Illinois statute restricting solicitation was valid under the First Amendment:

> "Our holding today is narrow: once a homeowner gives notice to a person that he or she does not desire to have the home listed for sale and that he or she does not desire to be contacted by real estate brokers who have previously been made aware of the decision, the right of a homeowner to decide what he or she will or will not hear, under the right to privacy, plainly outweighs the right of a real estate broker to continue to contact that person in his or her home. Once actual notice is received by a real estate agent, that agent is barred from contacting the homeowner for the purpose of persuading him or her to list the residence for sale. Our holding prevents neither a buyer nor a seller of real estate from contacting any person who had not notified the particular broker that he wishes to be left undisturbed."

Id. at 1304 (footnote omitted).[18]

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[18] The concurring judge agreed with the result reached by the court but believed *Rowan* to be distinguishable because "its holding was founded on the implied but obvious determination that the federal statute at issue there was content neutral and that it involved no '. . . discretionary evaluation of the material [by] a governmental official.' " *Curtis*, 840 F.2d at 1305. The dissent argued that "the merits of the plaintiff's constitutional argument must, at this very preliminary state of the litigation, be characterized as 'better than negligible.' " *Curtis*, 840 F.2d at 1308 (quoting *Brunswick Corp. v. Jones*, 784 F.2d 271, 275 (7th Cir. 1986)). He asserted that while "[t]he state certainly does have a strong interest in insuring the privacy of the home . . . there is no record to support the proposition that this statute directly protects that interest." *Id.* at 1307. He felt that "there is nothing in the record to support the conclusion that real estate solicitation is any more a threat to the privacy of the home than other forms of commercial intrusions." *Id.* The dissent also saw a problem with the final prong of the *Central Hudson* test, that the restriction be "not more extensive than is necessary to serve [the] interest," *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351, noting that the

(Footnote continued on following page)

The Realtors' challenge to the constitutionality of the municipal non-solicitation ordinances appears to recognize that our opinion in *Curtis* conflicts with their contentions but requests a re-evaluation and reversal of the *Curtis* decision. This we decline to do.

Before we address the specific contentions the Realtors raise concerning the constitutionality of these ordinances, we believe it important to briefly discuss a Supreme Court decision issued after our decision in *Curtis*, which directly spoke to the substantiality of the government interest in residential privacy. In *Frisby v. Schultz*, 487 U.S. 474, 108 S. Ct. 2495 (1988), the Supreme Court upheld against First Amendment challenge a local ordinance it interpreted to prohibit "focused picketing taking place solely in front of a particular residence . . . ." 487 U.S. at 483, 108 S. Ct. at 2501. In considering the interest in residential privacy the court recognized the importance of this basic interest:

> " 'The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.' *Carey v. Brown*, 447 U.S. [455,] 471, 100 S.Ct., at 2296 [(1980)]. Our prior decisions have often remarked on the unique nature of the home, 'the last citadel of the tired, the weary, and the sick', *Gregory v. Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring), and have recognized that '[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.' *Carey, supra*, 447 U.S., at 471, 100 S.Ct., at 2295."

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[18] *continued*
statute prevents "all real estate solicitation at any place (not just the home) at any time by any one." *Curtis*, 840 F.2d at 1307. He further questioned how directly *Rowan* supported our holding, since the statute in *Rowan* allowed recipients to "refuse any mail," and the Illinois statute only permitted restriction of "solicitations with respect to residential realty" and provided that the "recipient may apparently bar any message directed to him anywhere." *Id.* at 1308.

487 U.S. at 484, 108 S. Ct. at 2502. Then in language particularly relevant to the facts of our case, the Court emphasized the right of the resident to avoid speech intruding upon residential privacy and the right of governmental entities to enact legislation to facilitate the exercise of that right:

> "One important aspect of residential privacy is protection of the unwilling listener. Although in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different. 'That we are often "captives" outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere.' *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom. *See, e.g., FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749 (1978) (offensive radio broadcasts); *id.*, at 759-760 (Powell, J., concurring in part and concurring in judgment) (same); *Rowan, supra* (offensive mailings); *Kovacs v. Cooper*, 336 U.S. 77, 86-87 (1949) (sound trucks).
>
> "This principle is reflected even in prior decisions in which we have invalidated complete bans on expressive activity, including bans operating in residential areas. *See, e.g., Schneider v. State*, 308 U.S. 147, 162-163 (1939) (handbilling); *Martin v. Struthers*, 319 U.S. 141 (1943) (door-to-door solicitation). In all such cases, we have been careful to acknowledge that unwilling listeners may be protected when within their own homes. In *Schneider*, for example, in striking down a complete ban on handbilling, we spoke of a right to distribute literature only 'to one willing to receive it.' Similarly, when we invalidated a ban on door-to-door solicitation in *Martin*, we did so on the basis that the 'homeowner could protect himself from

> such intrusion by an appropriate sign "that he is unwilling to be disturbed." ' *Kovacs, supra*, 336 U.S. at 86. We have 'never intimated that the visitor could insert a foot in the door and insist on a hearing.' *Ibid.* There simply is no right to force speech into the home of an unwilling listener."

Frisby, 487 U.S. at 484-85, 108 S. Ct. at 2502 (citations omitted).

In light of the Supreme Court's powerful endorsement of the right of residential privacy in *Frisby*, the Realtors understandably do not challenge the proposition that residential privacy is a substantial governmental interest. Instead, they center upon the five municipal ordinances' alleged failure to conform to the final two prongs of the *Central Hudson* test. The Realtors assert that the ordinances do not "directly advance" the government's substantial interest in residential privacy and that the means the ordinances utilize are more extensive than necessary to serve their residential privacy purpose.

The Realtors' argument that the ordinances at issue fail to directly advance the interest in residential privacy focuses upon the ordinances' alleged "underinclusiveness." Specifically, the Realtors contend that the ordinances address only real estate solicitation when there is no demonstration that real estate solicitation is any greater threat to residential privacy than any other form of solicitation. We rejected this argument in *Curtis*:

> "Curtis responds that the statute is underinclusive because it does not prohibit forms of mail other than real estate solicitations from entry in the home. Mere underinclusiveness does not, however, amount to constitutional infirmity. As explained previously, a restriction on commercial speech may well be valid where it 'directly advances the governmental interest asserted, and . . . is not more *extensive* than is necessary to serve that interest.' *Central Hudson*, [447 U.S. at 566]. While the Illinois statute could have been *more* extensive, the state's decision to limit the scope of the statute does not translate into a constitutional problem . . . ."

840 F.2d at 1302-03 (footnote omitted, emphasis in *Curtis*). Thus, as in *Curtis*, the "underinclusiveness" of the ordinance fails to prevent it from advancing the government's interest in protecting residential privacy.

We now turn to the Realtors' argument that the solicitation restrictions in the municipal ordinances are without a reasonable relationship to the residential privacy purpose of these ordinances because the constraints are more extensive than necessary. In *Curtis* we stated that "if the state's decision as to where to draw the line between ends and means is reasonable, a court may not use its own findings to upset a plausible state decision." *Curtis*, 840 F.2d at 1303 n.11. As a general matter, the Realtors attack *Curtis* for this deference to legislative judgments in determining what constitutes the reasonable relationship between a law and the purpose of a law necessary to guarantee that the restrictions in the law are not more substantial than necessary to achieve its purpose. In response to the Realtors' contention, we point out that the Supreme Court's later decision in *Board of Trustees v. Fox*, 492 U.S. 469, 109 S. Ct. 3028 (1989), confirms our position in *Curtis* concerning the necessity to permit legislative bodies to exercise appropriate discretion concerning the tailoring of a law's means to achieve its ends:

> "In sum, while we have insisted that ' "the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing . . . the harmless from the harmful," ' *Shapero* [*v. Kentucky Bar Ass'n*, 108 S. Ct. 1916, 1924 (1988)], quoting *Zauderer* [*v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1988)], we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a ' *"fit" between the legislature's ends and the means chosen to accomplish those ends,' Posadas*, 478 U.S. at 341, 106 S. Ct., at 2977—*a fit that is not necessarily perfect, but*

> *reasonable*; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' *In re R.M.J.* [455 U.S. 191, 203 (1982)]; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave to governmental decisionmakers to judge what manner of regulation may best be employed."

Fox, 109 S. Ct. at 3034-35 (emphasis added).

The Realtors present a two-faceted challenge to the appropriateness of the means used in the municipal solicitation restriction for achieving the ordinances' purposes. Initially, the Realtors make a broad attack on our reasoning in *Curtis* that the Supreme Court's recognition in *Rowan* of a governmental power to protect unwilling recipients from solicitation in their own homes supports the constitutionality of the Illinois statute. This attack, if successful, would presumably invalidate the Illinois statute and any municipal limitation upon realtor solicitation of unwilling residents, irrespective of the restriction's scope. The second aspect of the Realtors' challenge is that, as the district court held, there is not a proper tailoring of the means of the ordinances to their ends because their "effect of banning all communication by mail from Realtors is far more extensive than necessary," to achieve the government's interest in "protecting the privacy of citizens who desire such protection" and "promoting the appearance of racial stability and avoiding fears of blockbusting and racial unrest." *South-Suburban Housing Center*, 713 F. Supp. at 1095. Success on this contention would invalidate a proscription of communications which do not directly solicit a real estate listing while permitting some restriction on direct solicitation of unwilling residents.

As stated above, the Realtors broadly contend that the Country Club Hills, Matteson, Glenwood, Hazel Crest and Park Forest ordinances do not utilize means which are appropriately suited to the goal of residential privacy be-

cause they do not involve mere attempts to facilitate the ability of objecting individuals to refuse to receive material under *Rowan*. The Realtors attempt to distinguish this case from *Rowan* by seizing upon language in the statute at issue in *Rowan* that provided that the householder could insulate himself from advertisements that offer for sale "matter which the addressee *in his sole discretion* believes to be erotically arousing or sexually provocative," 39 U.S.C. § 4009(a) (emphasis added), which means that

> "[i]n operative effect the power of the householder under the statute is unlimited; he may prohibit the mailing of a dry goods catalogue because he objects to the contents—or indeed the text of the language touting the merchandise. Congress provided the sweeping power not only to protect privacy but to avoid possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a governmental official."

Rowan, 397 U.S. at 737, 90 S. Ct. at 1491. The Realtors note that both the concurrence and the dissent in *Curtis* saw a distinction between the *Rowan* statute and the *Curtis* statute, which arguably would preclude absolute reliance upon *Rowan* as a rationale for upholding either the municipal anti-solicitation ordinances or the Illinois statute in *Curtis*.

With deference to the concurring and dissenting judges in *Curtis*, we are convinced that the ordinances at issue here and the statute in *Rowan* are materially indistinguishable for First Amendment purposes. In both legislative plans a householder is provided with the right to insulate himself from a particular category of communications. In *Rowan* the Supreme Court upheld the validity of a federal law permitting a householder to elect not to receive material that the householder believed to be "erotically arousing or sexually provocative." 39 U.S.C. § 4009(a). Indeed, the Supreme Court's discussion of the householder's right to control the receipt of unwanted mail has implications far beyond the statute at issue there:

> "In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail. To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider. Today's merchandising methods, the plethora of mass mailings subsidized by low postal rates, and the growth of the sale of large mailing lists as an industry in itself have changed the mailman from a carrier of primarily private communications, as he was in a more leisurely day, and have made him an adjunct of the mass mailer who sends unsolicited and often unwanted mail into every home. It places no strain on the doctrine of judicial notice to observe that whether measured by pieces or pounds, Everyman's mail today is made up overwhelmingly of material he did not seek from persons he does not know. And all too often it is matter he finds offensive. . . . Weighing the highly important right to communicate, but without trying to determine where it fits into constitutional imperatives, against the very basic right to be free from sights, sounds, and tangible matter we do not want, it seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee."

Rowan, 397 U.S. at 736-37, 90 S. Ct. at 1490. This case is similar to *Rowan* in that it involves local ordinances authorizing a resident's insulation from solicitation "intended to induce the sale, rental or listing for sale or rental of [a] dwelling" or "to offer or promote services in connection with the sale, rental or listing of [a] dwelling." Both in *Rowan* and the instant case it is the householder who is required to take the initiative in determining that he does not wish to receive the material. The *Rowan* Court's broad explanation of a householder's right to exclude unwanted mail fails to eliminate the similarity be-

tween the content-specific statute in *Rowan* and the content-specific ordinances at issue here. The district court's distinction between *Rowan* allowing "a resident to insulate himself from a particular mailer" and the authority granted in the ordinances to "exclude an entire class of mailers based upon occupation and content," *South-Suburban Housing Center*, 713 F. Supp. at 1102, is immaterial. Regardless of whether a single mailer or an entire class of mailers are involved, "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." *Rowan*, 397 U.S. at 736-37, 90 S. Ct. at 1490.

Although the Realtors would prefer the total invalidation of the municipal non-solicitation ordinances, they also argue, as the district court held, that the ordinances are constitutionally invalid because they effectuate the rights of unwilling residents to bar the receipt of mere indirect promotional material (realtor mailings not directly seeking a listing or sale of real estate) as well as direct attempts to solicit real estate. We fail to see any reason why the distinction between direct realtor solicitation and indirect realtor promotional material is relevant to the relationship between the means utilized in the non-solicitation ordinances and their end of protecting residential privacy. Both materials which "directly" solicit a real estate listing and those that are merely "indirect" disturb a person who wants nothing to do with any sort of real estate solicitation. Thus, the municipal ordinances restricting solicitation are appropriately tailored to serve the important purpose of protecting residential privacy.

In sum, we remain convinced that *Curtis* was properly decided. The municipal ordinances at issue here, like the Illinois solicitation restrictions in *Curtis*, "directly advance" the interest in residential privacy and exhibit a reasonable relationship between means and ends that guarantees that the restrictions are not more extensive than necessary to achieve their residential privacy purpose. Thus, we reverse the district court's decision invalidating the ordinances under the First Amendment.

C. Vagueness

The trial court also invalidated the ordinances involved on the basis of vagueness. The court held that "[t]he text of the ordinances provide insufficient warning that 'indirect' solicitation is prohibited and thus they are unconstitutionally vague." *South-Suburban Housing Center*, 713 F. Supp. at 1096.[19]

In *Penny Saver* we dealt with the issue of the vagueness of a previous version of Hazel Crest's restriction on solicitations. The former ordinance's definition of solicitation did not exempt advertisements in newspapers of general circulation. The publisher of a local newspaper, the Penny Saver brought an action for injunctive relief, declaratory relief and damages, alleging that the ordinance was unconstitutionally vague. The district court granted declaratory relief, holding that the former ordinance was vague, and awarded damages to Penny Saver for lost advertising revenues.[20] In upholding the district court's vagueness conclusion, we describe the basic standard applicable to a vagueness challenge: "If this Ordinance's provisions concerning solicitation are so vague that 'men of common intelligence must necessarily guess at its meaning,' *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), then it is void for vagueness." *Penny Saver*, 905 F.2d at 155. Applying this standard, we held that:

> "[T]he Village's Ordinance was impermissibly vague because it failed to inform the advertisers of the specific conduct that would render them liable. It purported to regulate real estate solicitations yet failed

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[19] Examples of such "indirect" solicitation that could be considered prohibited, in the district court's view, were the following contacts between real estate brokers and homeowners: "an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office."

[20] The request for injunctive relief had become moot, for the Village amended its ordinance to make it inapplicable to newspapers.

> to clearly define whether the Penny Saver's real estate advertisements were within the realm of the definition. This was compounded by the Village's enforcement practices. The Village had prosecuted Benkendorf for his advertising in the Penny Saver and stated its future intentions to actively enforce the Ordinance. Thus the advertisers were required to speculate as to the meaning of the Ordinance. *See Hynes*, 425 U.S. at 620. The language of the Ordinance did not provide the kind of precision which is required in statutes affecting first amendment interests and the extent of enforcement by the Village was unclear. *See id.* at 620. Because of this uncertainty, advertisers were apparently 'chilled' in the exercise of their first amendment rights. Rather than risk prosecution under the Ordinance, they relinquished advertising in the Penny Saver entirely. Accordingly, we hold, as did the district court, that the Village's Ordinance was unconstitutionally vague as applied to potential advertisers in newspapers."

Penny Saver, 905 F.2d at 155 (footnote omitted).

In contrast to *Penny Saver*, we rejected a vagueness challenge to the Illinois solicitation restrictions noted above in *Curtis*:

> " 'A statute is fatally vague only when it exposes a potential actor to some risk or detriment without giving him fair warning of the nature of the proscribed conduct.' *Rowan*, 397 U.S. at 740, 90 S.Ct. at 1492. In this case appellant knows precisely what she must refrain from doing on receipt of statutory notice. The complainants' names must be removed from any mailing the broker may have, and the broker must refrain from future communications to the named addressees. Appellant runs no substantial risk of miscalculation."

Curtis, 840 F.2d at 1304 n.12. The same analysis is applicable here. The clear and unambiguous terms of the ordinances (see ordinance provisions *supra* at 9-10), direct the Realtors precisely as to what they must do when they

receive a copy of the list of householders who wish to exclude real estate solicitations from their mail: They must simply remove the names of the parties from their mailing lists and refrain from future communication to these addressees who do not desire solicitation. As in *Curtis*, we fail to see a "substantial risk of miscalculation" when a party provides the requisite statutory notice, and thus, the statute is not unconstitutionally vague.

D. Equal Protection

The Realtors finally urge that the ordinances violate the Equal Protection Clause because they discriminate against the Realtors' speech through permitting homeowners to insulate themselves from real estate solicitations but not from other forms of speech. In *Curtis* we summarily disposed of an equal protection challenge to a similar statute, stating that: "Curtis' claim that the statute violates equal protection because it has no rational basis is without merit. Our holding that the provision directly advances the state's interest in insuring the privacy of homeowners forecloses Curtis' equal protection challenge." *Curtis*, 840 F.2d at 1304 n.12. *Curtis* was a clear application of the Supreme Court's reasoning in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 344 n.9, 106 S. Ct. 2968, 2978 n.9, where the Court held that "[i]f there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the First Amendment, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis." The discussion above established that there is a reasonable relationship between the legislature's means and ends.

The Realtors, however, argue that the analysis in *Posadas* is inapplicable herein, since *Posadas* concerned speech regarding an activity which could be banned entirely (casino gambling) while the speech involved here concerns an activity (real estate marketing) that the state could not entirely suppress. The Realtors' argument would have merit if the municipalities with anti-solicitation ordinances

directly banned real estate solicitations from all households in their communities. But this argument must fall, for the ordinances at issue are narrowly drafted to merely make it possible for the individual homeowner to elect not to receive a particular category of speech. *Rowan* and *Curtis* establish that there is no problem under the First Amendment when federal and state entities establish a particular classification of mailed communications which a householder can choose not to receive. Like the Supreme Court in *Posadas*, we fail to see any distinction between First Amendment "sufficient fit" analysis and the Fourteenth Amendment "rational basis" inquiry. We are convinced that when a municipality provides homeowners with the option of excluding objectionable speech from their mail through an ordinance satisfying free speech concerns, the exclusionary provision also satisfies the "rational basis" concerns of the Equal Protection Clause.

V. THE REALTORS' CHALLENGE TO THE MUNICIPALITIES' RESTRICTIONS ON "FOR SALE" SIGNS

The Realtors appeal from the trial court's determination that limitations on the size, placement and number of real estate "for sale" signs contained in the ordinances of Country Club Hills, Matteson, Park Forest and University Park were valid regulations of the place and manner of the involved speech. The Realtors further appeal from the district court's decision upholding the constitutionality of Country Club Hills' requirement that a permit be obtained for the display of a "for sale" sign. Finally, the Realtors appeal from the trial court's failure to hold that Glenwood's enforcement of a "for sale" sign ban followed by repeal of the ban on the eve of trial violated 42 U.S.C. § 3604(a) of the Fair Housing Act and merited an award of punitive damages under 42 U.S.C. § 3612(c).[21]

[21] The trial court rendered neither findings of fact nor conclusions of law on the Fair Housing Act issues allegedly raised in Glenwood's conduct.

A. Restrictions on Size, Placement and Number of "For Sale" Signs

The municipalities have enacted a variety of regulations on the size, placement and number of real estate "for sale" signs on a given piece of real estate. As in the case of the municipalities' solicitation restrictions, we must determine whether these limitations on commercial speech satisfy the four-part test the Supreme Court promulgated in *Central Hudson*. It is clear that "for sale" signs contain expression concerning a lawful activity, sale of a home, and are not misleading. Thus, the questions to be resolved are "whether the regulation[s] directly advance[ ] the governmental interest asserted, and whether [they are] not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351.

The trial court found that the declared purpose for each of the municipalities' restrictions on "for sale" signs was the promotion of aesthetic appearance. *See South-Suburban Housing Center*, 713 F. Supp. at 1090. There is nothing in the record that leads us to conclude that these aesthetic interests, declared in either the preamble or the text of the ordinances involved, were not the genuine purposes of each ordinance. Thus, we must determine whether the ordinances "directly advanced" the asserted aesthetic interests. There can be little doubt that the limitations on the number of "for sale" signs per property found in the ordinances of Matteson, Park Forest, Country Club Hills and University Park advance concerns for proper physical appearance. A proliferation of signs in a residential community certainly detracts from the beauty of that community. Likewise, the restrictions on the size of signs found in the ordinances of Matteson, Park Forest and Country Club Hills facilitate aesthetic concerns. A large sign is a greater intrusion on a residential neighborhood's appearance than is a smaller sign. Finally, the sign placement provisions contained in each City's or Village's ordinance contribute to neighborhood beauty. Uniform placement of signs in the window of a home or a regulated distance from it insures that the signs will not prove as

unsightly as haphazard placement. Thus, the municipal ordinances directly advance the legitimate governmental interest in the beauty of residential neighborhoods.

The more difficult question is whether there exists a reasonable relationship between the means the ordinances utilize and their purpose of promoting the quality of the residential neighborhood's appearance. As we noted in our discussion of the constitutionality of the municipalities' solicitation restrictions, the Supreme Court has given considerable leeway to legislative bodies in determining the appropriate means to further a legitimate governmental interest, even when enactments incidentally limit commercial speech. *See Board of Trustees v. Fox*, 109 S. Ct. at 3034-35.

The restrictions on the number of signs a seller may display on each property further the localities' interest in aesthetics while permitting a "for sale" sign to inform interested persons of the availability of a home. Because the record fails to demonstrate that these regulations prevent interested persons from learning a home is for sale, we conclude that they are "not more extensive than is necessary to serve [the government's legitimate] interest" in the appearance of its residential neighborhoods. As the trial court found, there is

> "little evidence that the sign regulations resulted in measurable lost income for realtors, that the regulations had a discriminatory impact on black home seekers, *or that they denied access to housing to anyone.* Therefore the court finds the sign regulations . . . are modest and reasonable."

South-Suburban Housing Center, 713 F. Supp. at 1090-91 (emphasis added).

B. Country Club Hills' Permit Requirement

The Realtors also challenge Country Club Hills' requirement that a permit carrying a fee of $60.00 be obtained for the display of a "for sale" sign in that City. The trial court rejected the Realtors' attack, holding that:

> "[T]he evidence submitted showed that Country Club Hills charged a fee and required an application for a permit for other commercial signs in residential areas. There was no evidence that the fees charged exceeded the administration costs."

South-Suburban Housing Center, 713 F. Supp. at 1103 (citations omitted).

The Supreme Court has established that a governmental body may enact a reasonable permit fee requirement to defray the cost of administering permissible regulation of a particular form of speech. *See Cox v. New Hampshire*, 312 U.S. 569, 576-77 (1941). There can be no question that the imposition of Country Club Hills' permit fee directly advances the City's aesthetic purposes in defraying the expenses necessary to enforce its regulations of real estate signs. But, the issue remains of whether the trial court properly found that permit fees did not exceed the cost of the administration of the "for sale" sign regulations, thus maintaining the necessary correlation between the ordinance's means and ends.

The Realtors assert that the district court's finding was improper because the City bears the burden of proof in justifying a restriction on commercial speech, and its failure to affirmatively demonstrate the specific costs it incurred in administering its ordinances regulating "for sale" signs meant that there was not the required relationship between the permit fee and the ordinances' purpose. We agree with the Realtors: "since the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require." *Fox*, 109 S. Ct. at 3035 (citation omitted). The Supreme Court has consistently invalidated fees that do not bear a rational relationship to the services involved in providing permits or licenses for communicative activities. *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 110 S. Ct. 688, 694 (1990); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Grosjean v. American Press Co.*, 297 U.S. 233

(1936). Since the City must justify restrictions on commercial speech, and the cost of a permit must be reasonably related to the City's cost in administrating the same, Country Club Hills was required to carry the burden of demonstrating that its permit fee of $60.00 for 6 months is not excessive in that it did not exceed the City's costs in enforcing its real estate sign regulations. Nonetheless, the City failed to present any specific evidence of dollar figures reflecting either the revenue it generated from its sign permit fees or its costs in administering its sign regulations. Because of the failure of Country Club Hills to demonstrate a reasonable relationship between its permit fees and administrative costs, we hold that the municipality's permit fee ordinance is unconstitutional.

C. Glenwood's Enforcement and Cessation of Enforcement of its "For Sale" Sign Ban

The Realtors finally allege that the trial court erred in failing to find Glenwood in violation of 42 U.S.C. § 3604(a)[22] and subject to punitive damages under 42 U.S.C. § 3612(c) for its enforcement of an allegedly constitutionally invalid ban on real estate "for sale" signs until shortly prior to the commencement of trial. The trial court rendered neither specific factual findings nor conclusions of law on this issue in either its initial decision or in its supplementary decision on the parties' motions to alter or amend the judgment. The record suggests that this failure may not have been entirely the fault of the trial court because the Realtors' post-trial motion, while asking for various amendments of the court's findings of fact, conclusions of law and judgment made no mention of the court's failure to render specific factual findings or legal conclusions on this issue.

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[22] "[I]t shall be unlawful—To . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin."

The questions of whether Glenwood violated the Fair Housing Act and whether its conduct merits an award of punitive damages are important and complex issues. Appellate review of the district court's judgment on these questions requires analysis of the trial court's reasoning that led it from a determination of the facts involved to an ultimate finding of discrimination or the absence thereof. To the extent the trial court in this case might be considered to have made a finding of non-discrimination, the absence of specific findings of fact or conclusions of law on this issue means that "we are unable to follow the district court's chain of reasoning . . . ." *Andre v. Bendix Corp.* (*Andre I*), 774 F.2d 786, 800 (7th Cir. 1985). Since the "district court's findings are inadequate for meaningful appellate review and we are unable to ascertain its reasoning," we remand this issue. *Id.* at 801. However, because the evidentiary record has been fully developed, we do not believe a new trial is required and we will "remand[ ] to the same judge for further findings [or proceedings if necessary]," *id.*, with respect to the questions of whether Glenwood's enforcement and cessation of enforcement of its "for sale" sign ban violated the Fair Housing Act and called for an award of punitive damages. Circuit Rule 36 shall not apply.

VI. CONCLUSION

In sum, we affirm the trial court's holding that the Realtors lack standing to pursue their consitutional claims as well as its dismissal of the Realtors' challenge to SSHC and Park Forest's implementation of the Apache Street affirmative marketing plan, since we hold that the AMP did not violate the Fair Housing Act. We also affirm the trial court's dismissal of SSHC's attacks on the Realtors' exclusion of the Apache Street listing from the MLS and commencement of disciplinary proceedings against William H. Motluck on the basis that this conduct also does not violate the Fair Housing Act. We affirm the trial court's dismissal of the Realtors' attempts to invalidate the regu-

lations of size, placement and number of "for sale" signs per property in Country Club Hills, Matteson, Park Forest and University Park because the Realtors have failed to demonstrate that these provisions violate the First Amendment. But, we reverse the trial court and invalidate Country Club Hills' $60.00 "for sale" sign permit fee requirement because of the City's failure to demonstrate that this fee was related to the cost of administrating its real estate sign regulations. We also reverse the trial court's determination that the anti-solicitation ordinances of Country Club Hills, Matteson, Glenwood, Hazel Crest and Park Forest violated the First Amendment and were unconstitutionally vague. We hold that these ordinances are devoid of constitutional infirmity, and we affirm the district court's holding that the anti-solicitation ordinances are not violative of the Fair Housing Act. Finally, we remand to the district court judge for findings on the question of whether Glenwood's enforcement and pre-trial cessation of enforcement of its "for sale" sign ban violated the Fair Housing Act and required an award of punitive damages.

AFFIRMED IN PART,
REVERSED IN PART,
REMANDED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: June 19, 1991

Before:

Honorable Harlington Wood, Jr., Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge

Nos. 89-2115, 89-2122, 89-2123, 89-2218,
89-2767, 89-2777, 89-2778, and 89-2846

SOUTH SUBURBAN HOUSING CENTER,

Plaintiff-Appellee

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Defendants/Counterplaintiffs-Appellants

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, et al.,

Counterdefendants-Appellees

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 83 C 8149, Judge Harry D. Leinenweber

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED in part, REVERSED in part, and REMANDED in part, in accordance with the opinion of this Court filed this date. Each party shall bear their own costs.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 5, 1991.

Before

Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

Nos. 89-2115, 89-2122, 89-2123, 89-2218,
89-2767, 89-2777, 89-2778, 89-2846

GREATER SOUTH SUBURBAN BOARD OF REALTORS and NATIONAL ASSOCIATION OF REALTORS,

Defendants, Counterplaintiffs-Appellants, Cross-Appellees,

v.

CITY OF BLUE ISLAND, et al.,

Counterdefendants-Appellees, Cross-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 89 C 8149—Harry D. Leinenweber, *Judge*.

ORDER

On consideration of the petition for rehearing in the above-entitled cause filed by plaintiff-appellee, cross-appellant, and the petition for rehearing with suggestion for

rehearing *in banc* filed by defendants, counterplaintiffs-appellants, cross-appellees, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

[713 F.Supp. 1068 (N.D.Ill. 1988)]

SOUTH-SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation, Counter-Defendant 7-21-84,

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation, National Association of Realtors, an Illinois not-for-profit corporation, Counter-Plaintiffs, Cross-Plaintiffs,

v.

CITY OF BLUE ISLAND, Village of Calumet Park, City of Country Club Hills, Village of Glenwood, Village of Hazel Crest, Village of Matteson, Village of Park Forest, Village of Richton Park, Village of University Park, Counter-Defendants.

No. 83 C 8149.

United States District Court,
N.D. Illinois, E.D.

Dec. 19, 1988.

As Corrected
April 27, 1989.

* * * * *

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

LEINENWEBER, District Judge.

COMPLAINT

FINDINGS OF FACT[1]

1. Plaintiff in this action is the South Suburban Housing Center, an Illinois not-for-profit corporation ("SSHC" or "Housing Center"). The SSHC carries on its activities within a Chicago, Illinois suburban area that is described in No. 4 of these Findings of Fact. The SSHC states that its purposes are to "promote and encourage multi-racial communities in the South Suburbs" of Chicago and "promote open housing to all people regardless of race." (Tr. 170, 346-47, Klepper; PX23) The SSHC's activities include providing assistance to homeseekers, "testing" for discriminatory real estate practices and suing those found to be engaged in such practices, conducting fair housing educational programs for realtors, apartment rental agents and the public, and assisting various government units in carrying out fair housing efforts. (Tr. 190-92, 215, 253-59, 266-67, 259-61, 286-89, Klepper) Christine Klepper ("Klepper") has been the Executive Director of the SSHC from 1980 to the present. (Tr. 190, Klepper)

2. The first named of two defendants in this action is the Greater South Suburban Board of Realtors[2] (the "GSSBR" or the "Board"). The GSSBR, an Illinois not-for-profit corporation, is an association of licensed real estate brokers and salesmen and a local affiliate of the

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[1] To the extent that any of the Findings of Fact reflect legal conclusions, they shall be deemed Conclusions of Law; and, to the extent that any of the Conclusions of Law reflect factual findings, they shall be deemed Findings of Fact.

[2] "Realtor" is a federally registered collective mark owned by the National Association of Realtors and is properly used only in reference to members of the Association. However at risk of violation of trademark law, the term "realtor" is used in this opinion to include all persons engaged in the sale or lease of real estate.

other named defendant in this action, the National Association of Realtors ("NAR"). (Counterclaim, ¶ 3) The GSSBR carries on its activities within approximately the same Chicago, Illinois suburban area in which the SSHC operates, and operates therein a real estate multiple listing service ("MLS") that is described in Nos. 25-27 of these Findings of Fact. Robert Turpin ("Turpin") was Executive Vice President of the GSSBR for "close to twenty years" and the chief operating officer of the GSSBR MLS at all times relevant to this action. (Tr. 625-27)

3. The second named defendant in this action is the NAR, an Illinois not-for-profit corporation, and an association of licensed real estate brokers and salesmen which provides policy guidance and materials and services of various sorts to its local affiliates, including the GSSBR. (Counterclaim, ¶ 2; Tr. 1471-80, North) William D. North ("North") was Senior Vice President and General Counsel of the NAR from 1980 to 1986, at which time he became Executive Vice President of the NAR. (Tr. 1459-63, 2114-15, North)

4. Both the SSHC and the GSSBR carry on their respective activities within approximately the same area in south Cook County and a small portion of northern Will County, Illinois. The area referred to (the "South Suburban Area") includes approximately thirty-seven municipalities and is bordered on the north by the southern border of the City of Chicago, on the west roughly by Harlem Avenue or Interstate 57, on the south roughly by the northern border of Will County (except that a few Will County communities are included in the South Suburban Area), and on the east by the Indiana state line. (Tr. 171-72, Klepper; Tr. 373-75, Pearson)

The South Suburban Area

5. As of 1970 the suburban communities south and southwest of Chicago had almost no black residents, including the communities immediately west and northwest of the South Suburban Area, Alsip, Burbank, Bridgeview, Chicago Ridge, Evergreen Park, Hickory Hills, Hometown, Oak Forest, Oak Lawn, Orland Park, Palos Hills, Palos Park, Palos Heights, Tinley Park, West Haven and Worth (collectively the "Southwest Suburban Area"). (MX500A; MX481A and 481C) In the South Suburban Area however several small communities, such as Robbins and Phoenix, had virtually all black populations from their inception; a few communities, such as Blue Island and Chicago Heights, had substantial black enclaves for many years; and a few others, such as Park Forest and University Park, had growing non-negligible black populations. *Id.*

6. During the period from 1970 to 1980 some communities in the central corridor of the South Suburban Area, directly south of the south side of Chicago, experienced substantial racial change while communities to the east and to the west continued to have negligible black populations. (Tr. 6843-48, Orfield; Tr. 1107-08, K. Williams; MX500A) For example, by 1980 the population of University Park had become 44.3 percent black; the population of both Harvey and Markham had become about two-thirds black; and the population of Calumet Park and Chicago Heights had become 30 percent and 28.8 percent black, respectively. (MX500A) In municipalities immediately adjacent to these communities there was also significant racial change; the populations of Country Club Hills, Hazel Crest and Matteson each changed from less than one percent to approximately 12 percent black. *Id.*

During the same decade some communities in the eastern portion of the South Suburban Area and the entirety of the Southwest Suburban Area remained with negligible black populations. (Tr. 1107, K. Williams; Tr. 6845-46, Orfield; MX481A and 481B; MX500A) Racial enrollment data for elementary school districts indicates that since 1980 the same pattern of racial change has continued and in some cases accelerated in communities in the South Suburban Area, while the black population of the Southwest Suburban Area has remained negligible. (Tr. 6860-62, Orfield; MX480-81, 481A, D and E)

7. These racial settlement patterns in the South Suburban Area, where historically all white areas experience integration and are subsequently threatened with resegregation, result from a complex mix of market forces. These market forces include racial prejudice: some whites and some blacks prefer to live in segregated communities; the belief that high concentrations of blacks result in a drop in home values; the expectation that an integraged community will eventually become segregated; and housing search practices that are reinforced by certain real estate practices. (Tr. 621; 4483-84; 6809-10)

8. Certain real estate practices tend to exacerbate the problem. Realtors, like any salesmen, adopt marketing strategies that will maximize sales at minimum effort. For example, since realtors make more money selling in house listings, realtors push these houses. Since black realtors tend to have listings from black clients[3] they tend to push listings in black or integrated neighborhoods to their pros-

[3] According to standard realtor nomenclature, a homeowner who gives a listing to a realtor is a "client"; a person seeking a home through a realtor is a "prospect"; as soon as a prospect makes an offer he becomes a "customer."

pects who also are mostly black. White realtors push listings in white neighborhoods to their white customers for the same reasons. (Tr. 350; 363, 1115; 7588-92)

Advertising strategies complement these sales efforts. Realtors advertise in the communities in which they expect to make the most sales. This means black realtors advertise in black communities and white realtors in white communities. (Tr. 73; 1115-16; 2653-61; 6069)

In short, realtors have little incentive in promoting integration for the sake of integration. They are interested in making sales. Accordingly, they are followers and not leaders of change in housing patterns.

9. In order to counter these market forces and to promote integrated living in the South Suburban Area, the SSHC has attempted to influence the housing market by encouraging the sales and marketing of real estate in what it terms to be "non-traditional" ways, i.e., encouraging whites to move to black or integrated areas and blacks to move to white or integrated areas. (Tr. 202-07)

Plaintiff's Definition of "Affirmative Marketing"

10. "Affirmative Marketing", according to plaintiff, consists of race conscious efforts to promote integration or prevent segregation through special marketing of real estate to attract persons of particular racial classifications who are not likely to either be aware of the availability or express an interest in the real estate without such special efforts. Affirmative marketing is multi-racial in that it approves of and encourages efforts to attract whites to racially integrated areas as well as blacks to racially segregated areas. (PX27)

11. "Affirmative Marketing" insofar as it involves special outreach to whites is controversial and has among its most vociferous critics some mainline black organizations who feel that such marketing efforts stigmatize blacks and tend to make housing less available to blacks. (DX41; DX44; Tr. 615-16) Others, principally the realtors, contend that affirmative marketing to whites is "benign steering" and quite possibly illegal. (Tr. 1649-63) If, for example, realtors assess that special outreach to whites is appropriate, they contend that they could be prosecuted for steering if their assessment is determined to be inaccurate.

The NAR/HUD Voluntary Affirmative Marketing Agreement

12. In 1979 the United States Department of Housing and Urban Development ("HUD") and the NAR executed a Voluntary Affirmative Marketing Agreement ("VAMA"). It provides a uniform approach to fair housing for NAR's boards and members. Acceptance of the VAMA eliminated the need for signatories to promulgate any other affirmative marketing plans but did not preclude them from doing so. (DX456)

13. The VAMA defines affirmative marketing "as a program to inform the *minority community* of the homes listed for sale or rent by Realtors, of the services offered by Realtors in selecting a home for purchase, and of the availability of these homes and services to all buyers without regard to race, color, religion, sex or national origin" (emphasis supplied). Thus the VAMA requires special outreach to minorities only. (DX456) This form of affirmative marketing is justified as remedial; i.e., to open areas that had previously been closed to minorities because of past discriminatory practices.

The Apache Street Listings

14. William Motluck ("Motluck") of Century 21-Host Realty ("Host") was the broker with whom the SSHC listed the three Apache Street homes involved in this case. (Tr. 325, Klepper) Motluck and Host were participants in the MLS, paid all fees charged by the MLS and had entered into agreements which bound them to comply with the MLS rules and regulations. (Answ. to complt., ¶¶ 13, 32) Motluck had performed the duties required of him under those agreements, including submission of his exclusive listings to the MLS. (DX549, p. 248)

15. The three homes involved in this action are on Apache Street, a horseshoe-shaped street of some forty-seven homes located in the northeast corner of the Eastgate subdivision in the Village of Park Forest, Illinois. (PX11; Tr. 141, Bean) Eastgate is bounded by Western Avenue on the west, 26th Street on the south, forest preserves on the east and the Beacon Hill and Forest Heights subdivisions of the City of Chicago Heights on the north. (PX11; Tr. 135-36, Bean)

16. Forest Heights subdivision, immediately north of the Apache Street area (MX582, pp. 364-65; PX11), was built beginning in 1970 and the majority of the homes were sold to blacks, many from Chicago's south and west side ghettos (MX582, p. 356) and by 1972 the population in Forest Heights was 99 percent black. *Id.* Racial turnover ensued in Beacon Hill, the subdivision immediately west of Forest Heights, which also adjoins Eastgate. *Id.*, pp. 355-56. (PX11) During 1970-1971 the Beacon Hill School which was a part of a Park Forest School District serving the Beacon Hill-Forest Heights area as well as parts of Park Forest, including Eastgate, had changed from 25 to 90 percent black and had become a racially identifiable

school. It was the only such one in Park Forest School District 163. (MX582, p. 360)

17. The evidence also indicated that as black families moved onto Apache Street in the early 1970's rumors had begun to circulate that the Eastgate area was going black. Many whites wanted to sell their houses and brokers began to steer whites away from the area. *Id.*, p. 365. Although the situation stabilized by the time of the 1980 census, the census black including Apache Street (No. 207) had become over 56 percent black, more than double the black population of any other census block in Eastgate. (MX582, p. 365; PX18-19; Tr. 149-51, 156, Bean; Tr. 1245, 1253, K. Williams; DX131)

18. At the time relevant to this action, homeseeking traffic on Apache Street was "predominantly black" (Motluck dep., p. 95) and there had been very little white demand for housing for some time. (Tr. 322, Klepper) The real estate industry in Park Forest was "knowledgeable" about Apache Street and its "makeup" and perceived that Apache Street was a "black block" on which whites were underrepresented. (Tr. 637-44, Turpin)

19. VA and FHA mortgage foreclosures in Eastgate leading to abandoned homes and neighborhood blight were an ongoing problem. (Tr. 141, Bean) In response to this problem Park Forest began a program of acquiring vacant or abandoned homes, chiefly by purchase from the United States Department of Housing and Urban Development ("HUD") or the Veteran's Administration ("VA"), rehabilitating the homes, and then reselling them. (Tr. 141, Bean; PX12)

20. Pursuant to this program Park Forest in 1982 purchased the vacant homes at 9, 15 and 26 Apache Street (the "Apache Street homes") from HUD or the VA. (Tr.

141-42, Bean) In September of 1982 Park Forest published a notice seeking bidders to purchase, rehabilitate and resell the Apache Street homes. (PX13)

21. On September 23, 1982 the SSHC submitted a proposal to Park Forest for the acquisition, rehabilitation and resale of the Apache Street homes, including affirmative marketing. (PX14; Tr. 145-46, Bean) Based on its analysis of a variety of data the SSHC had determined that without special outreach efforts few white homeseekers would be attracted to the Apache Street homes. (Tr. 322-23, Klepper)

22. On November 1, 1982 the Park Forest Board of Trustees voted to accept the SSHC's proposal for the acquisition, rehabilitation and resale with affirmative marketing of the Apache Street homes. (Tr. 146, Bean; DX142A-C) The SSHC then bought the three Apache Street homes and began to rehabilitate them. (Tr. 323-24, Klepper)

23. The SSHC and Motluck then entered into listing agreements for the Apache Street homes. (PX15-17) The listing included an affirmative marketing plan ("AMP"). (Tr. 1240-43, 1249-50, K. Williams) The AMP provided that Motluck was to use his "best efforts to attract minority and majority persons" to the Apache Street homes (PX15-17; AMP, ¶ 1), make a special outreach to whites by advertising in newspapers with a predominantly white circulation and distributing information to rental developments and employers where whites could be reached, *id.*; AMP, ¶ 3, and collect data on persons shown the homes, including their race. (*Id.*; AMP, ¶¶ 5, 7) The listings forbade "any action which prohibits, restricts, narrows or limits the housing choice of any client on the basis of race." (PX15-17; AMP, ¶ 4)

24. Through its village manager Park Forest reviewed and approved the Apache Street AMP as consistent with the Park Forest/SSHC contract. (Tr. 148-49, Bean)

25. The special outreach efforts provided for in the Apache Street listing agreements were to be carried out by Motluck alone; the agreements did not require other MLS participants, the MLS itself, or anyone other than Motluck to engage in special outreach activities. (PX15-17; Tr. 673, Turpin) No obligations were imposed upon MLS participants by inclusion of the Apache Street listings in the MLS; participants remained free to ignore the listings. (Tr. 660-62, Turpin) However, if a MLS participant chose to show Apache Street homes to a customer he was to provide Motluck with certain information about the customer, including race, either before or after the showing. (Tr. 1031-33, Klepper; PX15-17; AMP, ¶ 7) Lock boxes were provided for the Apache Street homes and all MLS participants had keys for such boxes which they could use to show the homes without any advance notice to Motluck. (Tr. 7492, Klepper)

26. The listing agreements for 9, 15 and 26 Apache Street were signed, respectively, on April 5th, April 10th and June 13, 1983. (PX15-17; Tr. 328, Klepper) Motluck submitted the listings to the MLS (Motluck dep., p. 34) and they were published in the MLS book. (PX55; Tr. 648-49, Turpin) The information which the MLS published concerning the Apache Street homes was exactly the kind of information published on all other homes listed (i.e., price, size, location, etc.); there was no reference in the MLS publication to affirmative marketing or special outreach. (PX55) The listings as published indicated that access to the homes was available by means of a lock box so that Realtors could enter and show the homes to homeseekers without contacting Motluck. (PX55; Tr. 7492, Klepper)

27. There was no evidence at all that the SSHC intended Motluck to reduce or that Motluck in any way reduced his efforts to market the Apache Street properties to blacks; in fact since his commission was contingent upon successfully marketing the properties to any purchaser regardless of color, and since homeseeking traffic in Eastgate was predominantly black, it would be easier to market the properties to blacks. Therefore he had a strong market incentive to market the properties in a way to reach the maximum number of blacks as well as whites.

The GSSBR Multiple Listing Service

28. The Board operates a multiple listing service ("MLS") a facility by which a MLS member broker makes a blanket unilateral offer of subagency to all other MLS participants with respect to a home listed with that broker. (Tr. 1499-1500) The MLS computer database contains information about homes listed for sale with its members. MLS members and their homeseeking prospects can review this data via computer terminals or by reviewing printed compilations distributed to members on a biweekly basis. (Tr. 2638-39)

29. The GSSBR's MLS is governed by its rules and regulations which provide, *inter alia*, that for a fee and agreement to submit all listings to the MLS, the MLS shall be available to participating Realtors and that the MLS reserves the right to refuse to accept a listing which in the opinion of its legal counsel failed "to protect adequately the interest of the public and the participants." (DX34)

30. On June 24, 1983 the GSSBR, based upon the advice of its legal counsel, Stuart Lindenberg ("Lindenberg"), removed the Apache Street listings from the MLS. The reason that the listings were removed was because

in the opinion of Lindenberg they were very possibly illegal and would violate the MLS rules and regulations and the concern that the data collection under the listings might constitute illegal racial steering.

The court finds that the removal was done in good faith and was not a pretense for discrimination.

Equal Opportunity Commission
Complaint Against Motluck

31. On June 24, 1983 the Equal Opportunity Commission ("EOC") voted against Lindenberg's advice to file a complaint against Motluck pursuant to Article 10 of the NAR's Code of Ethics (Tr. 479-83, Pearson; Tr. 7423, Lindenberg), Article 10, which is intended to "track" the Fair Housing Act (Tr. 2202-04, North), provides:

> "The Realtor shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The Realtor shall not be party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin."

(PX48, p. 29).

32. The EOC voted to file its complaint against Motluck because the Apache Street agreements called for "special outreach . . . to whites rather than to minorities." (Tr. 479-82, 491, Pearson) The EOC's position, based upon the HUD/NAR VAMA, was that special outreach to white homeseekers gave rise to a violation of Article 10. (Tr. 483-84, 486-87, Pearson)

33. Turpin was present during the EOC meeting of June 24, 1982. (Tr. 480, Pearson) On that day, after the EOC voted to file its complaint against Motluck, Turpin

withdrew the Apache Street listings from the MLS. (Answ. to complt., ¶ 19; Tr. 676, Turpin)

The court finds that the filing of the complaint was done in good faith and not a pretense for discrimination.

Indemnification Agreement

34. Some time after the withdrawal of the listings from MLS, very late in June or early July, Turpin first contracted North about the listings. (Tr. 1649-50, North) Turpin then sent North a copy of the Apache Street listings. (Tr. 1650, North) North examined the listings, but with other documents (Tr. 2510-11), and then drafted an Indemnification Agreement ("Agreement"). (Tr. 1670, North; PX44) The Agreement began as follows:

> "WHEREAS, Century 21-Host Realty [i.e., Motluck's company] requires its subagents to employ race-conscious criteria by the South Suburban Housing Center ('SSHC') when determining which prospective buyers to introduce to property owned by the SSHC and listed with Century 21-Host Realty; and
>
> "WHEREAS, the Greater South Suburban Board of REALTORS, Inc. ('the Board') is concerned that the use of such criteria may violate federal or state fair housing laws or the Illinois real estate licensing law . . . ' "

(PX44, p. 1) The Agreement called upon the SSHC and Motluck's company to indemnify the GSSBR and its members from all liability, including damages, costs, attorney's fees and other expenses by reason of any legal proceeding arising out of the Apache Street listings. (PX44, pp. 1-2)

35. On July 5, 1983 North sent Turpin a letter enclosing the Agreement (DX162) and a letter stating the NAR's recommendation that the GSSBR allow MLS ac-

cess for the Apache Street listings only upon condition that the Housing Center and Motluck sign the agreement. *Id.* At trial North said that his "concerns" respecting the Apache Street listings (Tr. 1650-69) led him to recommend indemnification because he believed the listings could lead to "legal liability" or "potential exposure" of the MLS or MLS participants under legal prohibitions against steering. (Tr. 1671-72)

36. The justification advanced by defendants for thus conditioning MLS access for the Apache Street listings was North's asserted belief that the listings called for actions which "likely" were racial steering and therefore could lead to "legal liability" or "potential exposure" for the MLS or MLS participants.

The court finds that this justification was made in good faith and was not a pretense for discrimination.

Plaintiff's Claims

37. The Housing Center asserts that defendants have violated its rights under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* (the Fair Housing Act), and at common law through their treatment of certain real estate listings (the "Apache Street listings" described in No. 23 of these Findings of Fact), particularly because (1) the GSSBR threatened the Housing Center's broker and then brought a formal ethics complaint against him for entering into the Apache Street listings, (2) for a time the GSSBR unconditionally denied the Apache Street listings access to its MLS, and (3) thereafter defendants conditioned access to the MLS for such listings upon a requirement that the Housing Center and its broker indemnify the GSSBR and its members from all liability and expenses occasioned by any legal proceeding out of the Apache Street listings.

CONCLUSIONS OF LAW

1. Jurisdiction

1. This court has jurisdiction over the subject matter of this action and counterclaim pursuant to 42 U.S.C. §§ 3612, 3617; 28 U.S.C. §§ 1331, 1334; 42 U.S.C. §§ 1982, 1983; 28 U.S.C. §§ 2201-02; and upon this court's pendent jurisdiction.

I. Fair Housing Act Claims

A. *Section 3604(a)*

2. Section 3604(a) of the Fair Housing Act makes it unlawful "[to] . . . make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin . . ." 42 U.S.C. § 3604(a) There are two recognized methods of proving a Section 3604(a) violation: by proving discriminatory intent or by proving discriminatory effect. *Metropolitan, etc. v. Village of Arlington Heights*, 558 F.2d 1283 (7th Cir.1977).

(i) Intent

3. The actions of defendants were motivated by other than discriminatory intent; the actions of defendants were motivated by a strong philosophical disagreement as well as a deep concern for the legality of the Apache Street listings' AMP. Although the court upholds the legality and constitutionality of the Apache Street AMP (Conclusion No. 8, *infra*, pp. 1087-88), there was substantial room for disagreement, on both the legal and the philosophical front. In any event there was insufficient evidence to establish that defendants' concerns over illegality were a pretense for discrimination.

(ii) Effects

4. *Arlington Heights* provides the Section 3604(a) standard when, as here, a plaintiff alleges that racially-neutral behavior created a discriminatory effect. *See, Phillips v. Hunter Trails Community Assn.*, 685 F.2d 184, 189 (7th Cir.1982). The four *Arlington Heights* factors to be considered are:

> 1) the strength of the showing of discriminatory effect;
>
> 2) some evidence of discriminatory intent;
>
> 3) the party's interest in taking the action complained of; and
>
> 4) whether the plaintiff seeks to compel the defendant to affirmatively further, or merely keep the defendant from interfering with, the fair housing activity.

Arlington Heights, 558 F.2d at 1290.

5. There are two different ways a facially-neutral decision can produce a discriminatory effect: (a) when that action has a greater adverse impact on one racial group than another; or (b) when the decision "perpetuates segregation." *Id.*

6. The actions of defendants did not have a racially disparate impact on white homeseekers in the south suburbs. The purpose of plaintiff's affirmative marketing with special outreach to whites was to increase the likelihood that whites would view the Apache Street properties in numbers beyond what would be expected if normal marketing techniques were used. Therefore plaintiff's affirmative marketing itself has a racially disparate impact. To the extent that defendants' activities may decrease the impact of affirmative marketing would not itself equal disparate impact.

7. The inability of Motluck to use the MLS did not perpetuate segregation. Plaintiff and its broker were free to continue with their special outreach activities. The actions of defendants in denying use of its MLS if anything would make it more difficult to sell the homes to blacks because cooperating brokers had no affirmative marketing obligations themselves and were knowledgeable about Apache Street, its racial and demographical makeup, and that there was little white demand. (Findings of Fact, ¶ 13)

8. The uncontradicted testimony of Turpin, Lindenberg, and others established that close adherence to the VAMA and their fear of being charged with racial steering motivated the Board's refusal to participate in the Apache Street plan. (Findings of Fact, ¶ 30) Defendants' desire to comply with the VAMA is a substantial interest deserving of deference from the court. *See, Hennessey v. NCCA*, 564 F.2d 1136, 1142-43 (5th Cir.1977) (holding that where collegiate athletic association was formed, in part, to adopt rules to govern its members, it was inappropriate for the court to reject the association's reasonable interpretation of its own bylaws).

Defendants' attempt to avoid liability for the Apache Street plan in what was perceived to be uncertain legal terrain is a legitimate and normal precautionary practice. Therefore the interest of defendants in taking the action complained of was legitimate and not a pretense for discrimination.

9. Although the relief sought, the inclusion of certain listing agreements into defendants' MLS, seeks to compel defendants to assist in its affirmative marketing activities, the intrusion is not severe. However this factor is not determinative. *Arlington Heights*, at 1295.

10. Accordingly, the court finds that plaintiff has failed to prove a violation of Section 3604(a) under either intent or effects analysis.

B. *Section 3606*

Section 3606 of the Fair Housing Act proscribes the denial or conditioning of access to a MLS "on account of race." 42 U.S.C. § 3606. Defendants' actions were not racially motivated. The requested indemnification was for reasons which were not pretextual for racial discrimination. The court therefore finds that defendants' actions did not violate Section 3606 on this claim for the same reasons as those stated with respect to the SSHC's claim under Section 3604(a).

C. *Section 3617*

11. Section 3617 of the Fair Housing Act prohibits interference with the enjoyment of fair housing rights. 42 U.S.C. § 3617. But that section does not under the circumstances of this case provide an independent ground for liability. In *Arlington Heights* the Seventh Circuit noted that "where the conduct that allegedly violated Section 3617 is the same conduct that allegedly violated Section 3604(a) and was engaged in by the same party, the validity of the section 3617 claim depends upon whether the [conduct] violated section 3604(a)." 558 F.2d at 1288 n. 5. *See*, also, *Atkins v. Robinson*, 545 F.Supp. 852, 865 (E.D.Va.1982), *aff'd* 733 F.2d 318 (4th Cir.1984). Consequently, since the SSHC failed to establish that the NAR and the GSSBR's actions violated Sections 3606 or 3604(a), its claim under Section 3617 also fails.

II. Breach of Contract

12. The SSHC also alleges that it was a third-party beneficiary of an "agreement" between Motluck and the MLS and that the Board breached that "contract" by requesting indemnification from Motluck and the SSHC.

13. However the SSHC did not establish an essential element of its third-party beneficiary claim, breach of contract between GSSBR and Motluck. The MLS rules and regulations do not require the GSSBR to publish whatever listings Motluck chose to submit. Section 12 clearly states that the MLS through its legal counsel may "refuse to accept a listing form which fails to protect adequately the interests of the public and the participants." This provision granted the GSSBR discrimination to act as it did with respect to the Apache Street listings when, as here, the court found that the decision of the legal counsel was not pretextual. (Findings of Fact, ¶ 27; Conclusions of Law, ¶ 3) Thus, even if the SSHC was a third-party beneficiary of the alleged "MLS contract," its breach of contract claim would lose under the express terms of the MLS rules. *See, R & L Grain Co. v. Chgo. Eastern Corp.*, 531 F.Supp. 201, 209 (N.D.Ill.1981).

III. Tortious Interference

14. In order to prove a claim for tortious interference with prospective economic advantage, a party must establish the following elements: (1) a reasonable expectancy of an economic advantage (here entering into contracts for the sale of homes); (2) knowledge of the expectancy by defendants; (3) the intentional wrongful interference with the expectancy; and (4) damages resulting from defendants' actions. *Knapp v. McCoy*, 548 F.Supp. 1115, 1117 (N.D.Ill.1982); *Tom Olesker's Exciting World of*

Fashion v. Dun & Bradstreet, Inc., 16 Ill.App.3d 709, 306 N.E.2d 549, 553 (1st Cir.1973), *rev'd in part on other grounds*, 61 Ill.2d 129, 334 N.E.2d 160 (1975).

15. The SSHC has failed to show that defendants' alleged interference was "wrongful" or intended to injure the SSHC. *See, R.H. Donnelley Corp. v. IBT*, 595 F.Supp. 1202, 1208 (N.D.Ill.1984). Defendants' motive was not to interfere with the SSHC's attempts to sell the Apache Street homes; they wanted to protect the Board and its MLS participants from exposure to suit or liability. Since defendants were pursuing legitimate business and legal interests when they acted on the Apache Street plan, their actions do not approach the level of legal malice required to sustain the SSHC's claim. *Bank Computer v. Continental Ill. Nat. Bank*, 110 Ill.App.3d 492, 66 Ill.Dec. 160, 167, 442 N.E.2d 586, 593 (1982). *See, Petit v. Cuneo*, 290 Ill.App. 16, 22, 7 N.E.2d 774, 777 (1st Cir.1937) ("one who has an interest may take action to protect his rights.")

Accordingly, Counts I, II and III of plaintiff's complaint are dismissed.

COUNTERCLAIM

FINDINGS OF FACT[4]

I. Parties

1. Counterplaintiffs in this action are the Greater South Suburban Board of Realtors ("GSSBR") and the National Association of Realtors ("NAR") (collectively "counterplaintiffs" or "Realtors").

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[4] The court adopts the Findings of Fact on the complaint and the Findings of Fact on the counterclaim to the extent they are relevant.

As a professional association of real estate brokers and salesmen, the NAR's organizational goals are to (1) help its members understand and comply with laws governing the sale of housing—in particular fair housing laws—thereby reducing its members' risk of violating such laws, (2) promote its members and the profession, and (3) establish a free and open housing market which operates without regard to race. (Tr. 1475-76) The NAR has invested substantial time and money in developing a comprehensive program to attain these goals. That program includes establishing bylaws, regulations and training programs that assist Realtors in complying with fair housing laws (Findings of Fact, ¶¶ 3-6), entering into the NAR's VAMA (Findings of Fact, ¶¶ 7-9), and assisting members in challenging regulations and legislation that unconstitutionally restrict Realtors' or the public's right to a market founded on the principles of equal opportunity and free choice. (Tr. 1577-83; DX78)

2. In addition to counterdefendant South Suburban Housing Center ("SSHC" or "Housing Center"), there are five remaining municipal counterdefendants (or "municipalities") in this case: the City of Country Club Hills, the Village of Glenwood, the Village of Hazel Crest, the Village of Matteson and the Village of Park Forest. A sixth municipality—the Village of University Park—is in the case only with respect to counterplaintiffs' challenge of its "for sale" sign regulation.[5]

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[5] There were originally nine municipal counterdefendants in the case. To streamline adjudication and because of the similarity of purpose and effect of challenged ordinances and programs among the nine municipal counterdefendants, the court entered two agreed orders on September 1, 1987. These orders provided that, with respect to the municipalities of Blue Island, Calumet Park, Richton Park and (except with respect to its real estate sign ordinance) University Park, the court would "make no findings and grant no

(Footnote continued on following page)

3. Country Club Hills has a city form of government, with a mayor elected at large and eight aldermen elected, two from each of four wards. (Tr.6498) It is located in the central corridor of the South Suburbs, bordered by Markham, Flossmoor, Hazel Crest and unincorporated areas. (MX481) As of 1980 Country Club Hills' population was approximately 14,767—eighty-four percent white and twelve percent black. (MX500A) It has twelve subdivisions (MX510A) and approximately three thousand owner-occupied and twelve hundred renter-occupied households. (MX478K, Table 26)

4. Hazel Crest was incorporated in 1912. It has a village form of government, with a president and board of trustees elected at large and a village manager. (Tr.6321) It is also located in the central corridor of the South Suburbs, bordered by Markham, Harvey, East Hazel Crest, Homewood, Flossmoor and Country Club Hills. (Tr. 6322; MX481) As of 1980 Hazel Crest's population was approximately 14,000—eighty-six percent white and twelve percent black. (MX500A) The present population is still estimated to be 14,000, of which now sixty to sixty-five percent is white and twenty-five to thirty percent is black. (Tr.6278-79; 6360-61) Hazel Crest has ten subdivisions and approximately thirty eight hundred owner-occupied and approximately six hundred sixty renter-occupied households. (MX478T, Table 26)

5. Glenwood was originally settled in 1835 and incorporated in 1903. (Tr.5745) It has a village form of govern-

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[5] *continued*
relief" in this case, in return for which each of those four municipalities agreed to abide by any relief granted by the court against the remaining municipal counterdefendants which related to an ordinance in effect in substantially identical form in any of the four municipalities.

ment, with six trustees and a mayor elected at-large. (Tr.5741-42) Glenwood is also located in the central corridor of the South Suburbs, approximately bordered by Thornton, Homewood, Flossmoor and Chicago Heights, with Cook County forest preserves around its remaining borders. (MX481) In 1980 Glenwood's population was approximately 10,500—eighty-nine percent white and ten percent black. (MX500A) Glenwood's current population is still estimated to be 10,500—approximately eighty to eighty-five percent white and fifteen to twenty percent black. (Tr.5746; 5753) Glenwood has five subdivisions and approximately twenty three hundred single family homes, seven hundred condominiums and four to five hundred apartment units. (Tr.3360; 3687; 5743-45; MX478R, Table 26)

6. Matteson has a village form of government, with a president, board of trustees and village manager. Matteson is located in the southern half of the central corridor in the South Suburbs and is bordered by Olympia Fields, Park Forest and Richton Park. (MX481) In 1980 Matteson's population was 10,233—of which approximately twelve percent was black and eighty-three percent white. (MX500A) Matteson has eight neighborhoods or subdivisions (MX251-58) and approximately twenty five hundred owner-occupied and seven hundred renter-occupied households. (MX478AA, Table 26)

7. Park Forest was initially developed in 1947 and incorporated in 1949. (Tr.4976) Park Forest has a village form of government with a board of trustees, village president and village manager. It is located at the south end of the central corridor in the South Suburbs bordered by Chicago Heights, Olympia Fields, Matteson, Richton Park and University Park. (MX481) In 1980 Park Forests population was approximately 26,000—eighty-eight percent

white and twelve percent black. (MX500A) While its population is still the same composition it is now approximately eighty-three percent white and seventeen percent black. (Tr.4979; 4981) There are fifty five hundred single family homes, twenty three hundred co-ops or condominium townhouses, six hundred thirty townhomes and seven hundred high-rise rental units in Park Forest. (TR.4990)

8. University Park has a village form of government and is also located at the far southern end of the central corridor in the South Suburbs. (MX481) It is bordered by Park Forest, Richton Park, Monee and unincorporated areas. (MX481) As of 1980 University Park's population was 6,245—fifty-three and one-half percent white and forty-four and three tenths percent black. (MX500A) Within its borders there are approximately twelve hundred forty owner-occupied and eight hundred twenty renter-occupied households. (MX478WW, Table 26)

II. Nature of the Action

9. Counterplaintiffs' second amended counterclaim is a six-count attack against the fair housing policies of the SSHC and certain fair housing and other policies and ordinances of the municipalities. As set forth below, not all counts seek relief against every counterdefendant. Count I alleges that the Apache Street AMP of counterdefendants SSHC and Park Forest violates the Fair Housing Act and Sections 1982 and 1983 of the Civil Rights Act. Count II asserts that the so-called "integration maintenance" programs of all counterdefendants are a pattern and practice of racial steering and discrimination which violates the Fair Housing Act, the Constitutional right of equal protection and Sections 1982 and 1983. Count III

attacks Hazel Crest's "for sale" sign ban and the sign placement and size regulations of Country Club Hills, Matteson, Park Forest and University Park, alleging that those ordinances violate the First Amendment, the Fair Housing Act and Sections 1982 and 1983. Count IV is directed against the solicitation ordinances of the municipal counterdefendants and alleges that those ordinances, both facially and as applied, violate the First Amendment, due process and equal protection, Sections 1982 and 1983 and the Fair Housing Act. Count V alleges that Glenwood and Matteson's fair housing data reporting ordinances violate privacy rights, equal protection and due process, the First Amendment, Section 1982 and 1983 and the Fair Housing Act. Count VI alleges that profit/not-for-profit distinctions in the fair housing ordinances of the municipal counterdefendants violate equal protection and Section 1983 and are preempted by Section 3615 of the Fair Housing Act.

10. Although the counterclaim originally sought damages as well as equitable relief, counterplaintiffs withdrew their damage claims at the commencement of trial and never offered any evidence as to damages. Consequently only claims for declaratory and injunctive relief remain with respect to each count.

CONCLUSIONS OF LAW

I. Standing of the NAR and the GSSBR

1. The NAR and the Board have standing under Article III of the Constitution and Title VIII to assert their counterclaims because they have allegedly suffered a distinct and palpable injury that is fairly traceable to counterdefendants' conduct and because relief from the injury would be likely to follow from a favorable decision. *See*,

Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 261-62, 97 S.Ct. 555, 561-62, 50 L.Ed.2d 450 (1977). Counterdefendants' programs and ordinances allegedly impair the NAR and the Board's ability to attain their organizational goals by interfering with their activities, policies and programs and causing a consequent drain on their resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380, 102 S.Ct 1114, 1125, 71 L.Ed.2d 214 (1982). In addition they have standing as representatives of their members because they satisfy the three requirements for representational standing: (1) their members have standing; (2) the interests the NAR and the Board seek to protect are genuine to their organizational purpose; and (3) neither the claims asserted nor the relief requested requires the participation of individual members. *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d 383 (1977). Counterdefendants' arguments as to standing tend to go to the merits of counterplaintiff's claims rather than to the nature of the injury complained of. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1985).

2. Counterplaintiffs also have standing to assert claims under Sections 1982 and 1983 because of the allegations that counterdefendants' actions interfere with the right to market real estate to blacks. Here counterplaintiffs have taken steps to develop and implement its VAMA which they allege is being undermined by counterdefendants. *Warth v. Seldin*, 107 S.Ct. at 2210.

Prudential considerations have also been met. Here the alleged injury is specific to counterdefendants' members whose rights are being asserted. *Warth*, p. 2206.

FINDINGS OF FACT

COUNTS I and II

1. The SSHC conducts the following programs that are objected to by counterplaintiffs.

a. *Assistance to Homeseekers*

Counterplaintiffs apparently do not challenge the SSHC's assistance to black south suburban residents victimized by racial harassment, nor the SSHC's efforts to help CHA families, mainly black, find housing in the south suburbs. These activities are plainly inconsistent with a purpose of restricting the number of black South Suburban Area residents.

Although the counterclaim (¶ 35c) refers to homeseeker "counseling services sponsored by either SSHC or the municipalities," counterplaintiffs' counsel indicated at trial they are not attacking some part or all of the SSHC Homeseekers Service ("Service"). (Tr.7506) In any event, the evidence indicates that the SSHC's Service "is a supplement to the normal housing market" which any homeseeker may use if he chooses. (Tr.209, Klepper) The Service provides the same assistance to blacks or whites, although the "traditional" and "nontraditional" choices which are discussed with blacks and whites differ because, given the normal housing search patterns, blacks are unlikely to consider all white areas and whites are unlikely to consider all black or rapidly integrating areas. (Tr.7296-97, Matthews; Tr.201-02, 208-09, Klepper; Tr.5371-74, Cardona)

The SSHC makes "clear to everyone" assisted by the Service that "[t]he final choice is always that of the individual." (Tr.209, Klepper; PX23; PX96) Service clients

are asked to read cards which explain the SSHC's policy and state "SSHC works with homeseekers individually to expand options to include total marketplace" and "the final choice is always that of the individual." (PX23; PX96) If homeseekers decide "they want traditional housing listings, we will give them those . . ." (Tr.208, Klepper) Ultimately, a "few more families make nontraditional moves than traditional." (Tr.211, Klepper)

b. *Testing and Compliance Activities*

The evidence indicates that the SSHC's testing and litigation activities have been designed to "open up" housing options and combat discrimination, particularly with respect to blacks. Although the counterclaim asserts that SSHC tests are used "to force Realtors to comply with . . . integration maintenance programs" (counterclaim, ¶ 35(b)), counterplaintiffs' counsel withdrew that allegation during the trial. (Tr.7508-12)

c. *Educational Activities*

Counterplaintiffs apparently do not challenge many of the SSHC's educational activities including those designed to inform Realtors and the public about fair housing laws. Counterplaintiffs do appear to challenge the SSHC's education about affirmative marketing. (Counterclaim, ¶ 35(d)) Respecting such activities, the evidence indicates that the SSHC ". . . always says[s] affirmative marketing is absolutely not to limit anybody's housing choice. It's to do exactly the opposite." (Tr.268, Klepper) SSHC literature distributed to Realtors during seminars states "Affirmative Marketing is assisting homeseekers individually to expand options to include the total marketplace . . . The final choice is always that of the individual." (PX27) The

evidence indicates that during the seminars the SSHC stresses that "you never take anything away from somebody. You only add something," and the goal should be "100 percent of the people competing for 100 percent of the housing." (Tr.220, 226, Klepper) Although several hundred GSSBR Realtors have attended SSHC seminars (Tr. 228, Klepper), counterplaintiffs offered no evidence from any Realtors that the SSHC's message has ever been different.

Similarly, the SSHC's guide for apartment managers and rental agents (PX29) states:

> "Affirmative Marketing is a method of providing *information* to racial groups least likely to apply for housing . . . The goal: to promote racially diverse traffic and demand for housing." (PX29, p. 3)
>
> "Affirmative Marketing had nothing to do with racial 'quotas.' No person can be lawfully denied access to the housing of his or her choice because of race. The legitimate function of promoting residential racial diversity cannot be done by limiting the options of individuals." (PX 29, p. 11)

The principles embodied in the quoted language are always part of the information about Affirmative Marketing that the SSHC gives to rental agents. (Tr.255, Klepper)

d. *Apache Street*

The SSHC's stated purpose in entering into and implementing the Apache Street listings was to add some "white traffic to the properties in addition to the black traffic," not to decrease or restrict the black traffic. The relevant evidence supports a finding that that was in fact the SSHC's purpose. (Cmplt., Findings of Fact, ¶ 27)

e. *SSHC Activities in General*

Respecting all of the SSHC's activities, Klepper testified:

> "We [are] about encouraging racial diversity. We are about promoting demand from blacks and whites in housing . . . Whatever the racial makeup of the community turns out to be, whatever it is, as long as it is the result of free choice, people making fully informed decisions, not decisions based on past discrimination, not decisions based on past discriminatory housing practices, not based on fears, not based on perceptions, you know, true free choice; and whatever the community turns out to be is what it turns out to be . . .
>
> "We're talking about ending a dual housing market where people do not have free choice. That is what we're talking about. Expanded housing opportunities.
>
> "We are not about restricting anybody's housing choice. We make recommendations to expand housing choice . . . It doesn't mean if you suggest to a black family something in addition to University Park that you don't offer University Park. You don't take anything away. You add something . . ."

2. The court finds that the effect of the SSHC activities has not been to "restrict" or "control" access to housing but rather to expand the information about housing available for consideration by homeseekers and to promote racially diverse living and the prevention of resegregation.

3. In addition to the foregoing, the complaint attacks the foregoing as being elements of municipal "integration maintenance programs." (Counterclaim, ¶¶ 25-31, 35) The evidence presented at trial demonstrated that the SSHC (and not the municipalities) has controlled and implemented most of the programs challenged. The specific municipal

efforts appear to be advertising and marketing campaigns of Hazel Crest, Matteson and Glenwood.

4. There was no evidence presented that the purpose of any advertising or marketing efforts was to deny equal housing opportunity, restrict access to housing, manipulate choice, or otherwise impose a quota on any racial group. Instead, the efforts were directed to providing information to those felt less likely to consider housing in those suburbs and thus to promote integrated living.

5. These efforts also, to the extent that housing demand is increased as a result of such efforts, has a beneficial effect on the real estate business in general and homeowners and brokers in particular.

CONCLUSIONS OF LAW

COUNTS I and II

1. Counterplaintiffs are the GSSBR and NAR, the defendants to the complaint. Counterdefendants under Count I of the counterclaim are the SSHC and the Village of Park Forest. Counterdefendants under Count II of the counterclaim are the SSHC and nine municipalities (including Park Forest), all of which are located in the South Suburban area.

2. It is a fundamental national policy to promote stable, long-term racial diversity in the communities of the United States. As the Supreme Court repeatedly has said, " '[t]here can be no question about the importance' to a community of 'promoting stable, racially integrated housing.' " *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 111, 99 S.Ct. 1601, 1613, 60 L.Ed.2d 66 (1979), quoting *Linmark Assocs., Inc. v. Willingboro Twsp.*, 431 U.S. 85, 94, 98 S.Ct. 1614, 1619, 53 L.Ed.2d 155 (1977). The Seventh Cir-

cuit observed in the *Arlington Heights* decision: "[The Fair Housing] Act was intended to promote 'open, integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.' " *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1289 (7th Cir.1977), *cert. denied* 434 U.S. 1025, 98 S.Ct. 752, 54 L.Ed.2d 772 (1978) (hereinafter referred to as *Arlington Heights II*), quoting *Otero v. NY City Housing Authority*, 484 F.2d 1122, 1134 (2d Cir.1973). The national commitment to the promotion of integrated housing has long been emphasized by the Supreme Court. *See*, e.g., *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211, 93 S.Ct. 364, 368, 34 L.Ed.2d 415 (1972) (perpetuation of segregation can be as deleterious as purposefully discriminatory conduct in frustrating national commitment "to replace the ghettos 'by truly integrated and balanced living quarters' ".)

3. This national commitment requires special attention to the needs of an integrated community threatened with resegregation. As the Supreme Court said in *Gladstone*, 441 U.S. at 110, 99 S.Ct. at 1613, the "adverse consequences attendant upon a 'changing' neighborhood" are often "profound." These harms basically "flow from the realities of a racially segregated community" and include a reduction in homebuying demand, the diminishment of the tax base, a threat to the ability of the community to bear the costs of local government and to provide essential services and the loss of the positive benefits of living in an integrated community. *Id.* at 110-11, 99 S.Ct. at 1613-14.

4. The *types* of activities the SSHC engages in which counterplaintiffs challenge—Affirmative Marketing, Testing,

Counseling, and Realtor Training (counterclaim, ¶ 35)—are all *per se* lawful:

(a) *Affirmative Marketing.* For the reasons given affirmative marketing is a lawful activity. (See Conclusion No. 8, *infra*, p. 1087)

(b) *Testing.* The Court of Appeals for the Seventh Circuit has noted that courts "have repeatedly approved and sanctioned the role of 'testers' in racial discrimination cases," and "the evidence provided by testers is frequently valuable if not indispensable." *Richardson v. Howard*, 712 F.2d 319, 321 (7th Cir.1983).

(c) *Counseling/Assistance to Homeseekers.* Providing homeseekers with information about additional housing options, in particular options which would promote integration, is lawful for the same reason affirmative marketing is lawful—it does not deny or "otherwise make unavailable" any housing to anyone. *See*, also, the NAR's statements that "encouragement of integration . . . [is] consistent with the national housing policy." (PX52, p. 45; PX53, p. 15)

(d) *Realtor Training.* Patently it is not unlawful for a fair housing center to exercise its First Amendment rights to provide educational seminars for Realtors who choose to attend.

5. Thus the issue on the counterclaim with regard to the SSHC is not the Center's stated purpose of promoting integration, nor the types of programs it employs to pursue that purpose. Rather, the issue is whether the SSHC's specific implementation of its programs which counterplaintiffs call "integration maintenance" is in some respect unlawful. The court will examine counterplaintiffs' claims to this effect under the Fair Housing Act in Parts a and b below, and their claims under 42 U.S.C. §§ 1982 and 1983 in Parts c and d respectively.

a. *Fair Housing Claims—Effects Analysis*

6. A Fair Housing Act violation may be established by means of an "effects" analysis involving four factors:

(1) the effect of challenged conduct (whether it perpetuates segregation or has a greater adverse impact on one racial group than another);

(2) some evidence of discriminatory intent;

(3) the "interest" of the defendant in taking the challenged action; and

(4) the nature of the relief plaintiff seeks.

Arlington Heights, at 1290-93.

7. The alleged invidious effect of the SSHC programs "is to enforce [SSHC's] preferred population mix" or "quota" (counterclaim, ¶ 24), thus "restricting access to housing, with minority home buyers and renters shouldering most of the burden." *Id.*, ¶ 22. The court concludes that counterplaintiffs have failed to show any such effect of the SSHC's programs. As in *Steptoe v. Beverly Area Planning Assn.*, 674 F.Supp. 1313 (N.D.Ill.1987), the SSHC's activities do not "affect detrimentally the availability of housing" because they "do not deprive anyone of . . . housing information," but "served to increase, not decrease, the existing supply of housing information," and its "practice of fully informing homeseekers of its policy avoided the dangers inherent in the typical steering situation . . ." *Steptoe, supra*, at 1319, 1320.[6]

8. The main thrust of counterplaintiffs case was the assault against "affirmative marketing" adopted by coun-

[6] The court notes that the housing center in *Steptoe* helped only homeseekers interested in making non-traditional moves, *id.* at 1315, while the SSHC helps all homeseekers.

terdefendant, the SSHC, for use in the Apache Street AMP. (See Findings of Fact, Nos. 10 and 23, complt.) The court concludes that such affirmative marketing does not have the effect of a greater adverse impact on one racial group than another.

Since affirmative marketing does not contemplate the lessening of normal marketing activities designed to reach the racial group most likely to be attracted to the property in question, there is little adverse impact on the availability of the housing in question.[7]

Such measures are temporary in nature: to be used only in efforts to integrate segregated housing or to prevent resegregation of integrated housing. When integration occurs or the threat of resegregation abates affirmative marketing would no longer be necessary. There was no evidence submitted that affirmative marketing was being used to prevent integration or encourage resegregation; on the contrary, all of the evidence indicated that the opposite was the case.[8]

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[7] Except to the extent that wider marketing than normal would increase the number of people who would be aware of the availability of the property, increasing the likelihood that the property will be sold sooner or at a higher price. However since plaintiff's form of affirmative marketing works both ways, i.e., requires special marketing efforts to attract blacks to white areas and whites to black areas, the disparate impact is lessened if non-existent.

[8] *U.S. v. Starrett City Assocs.*, 840 F.2d 1096 (2nd Cir.1988), *cert. denied* ____ U.S. ____, 109 S.Ct. 376, 102 L.Ed.2d 365 (1988), does not require an opposite holding. The majority opinion said:

> "We do not intend to imply that race is always an inappropriate consideration under title VIII in efforts to promote integrated housing. We hold only that title VII does not allow appellants to use rigid quotas of indefinite duration to maintain a fixed level of integration . . ."

Id., p. 1103.

9. Counterplaintiffs' allegation respecting the second *Arlington Heights* factor of intent is that the SSHC's intent is to limit homeseekers' housing choices: "restrict[ ] access to housing", *id.*, ¶ 22; "manipulate the racial composition of the homeseeker traffic", *id.*, ¶ 24; "control the movement and distribution of minorities", *id.*, ¶ 33. The court concludes that counterplaintiffs have failed to prove those allegations. The activities of the SSHC are carefully designed not to modify "normal" homeseeking activities or limit anyone's housing choices.

10. The third *Arlington Heights* factor is counterdefendants' interest in taking the challenged action. Although the SSHC is a private entity, in taking the actions of which counterplaintiffs complain the SSHC is not "seeking to protect private rights", *Arlington Heights*, p. 1293, so as to render its interest inconsequential. Rather, the SSHC seeks to further what Congress and the courts have recognized as an important national goal of promoting stable, racially integrated housing. Many SSHC programs are undertaken in cooperation with or at the behest of government bodies. Thus the SSHC's activities are infused with a strong public interest that should be accorded considerable weight. Under the circumstances, the third *Arlington Heights* factor also weighs the SSHC's favor.

11. The fourth *Arlington Heights* factor, the nature of the relief plaintiff seeks, was posed in terms of whether the plaintiff sought to "compel the defendant to . . . take affirmative steps to ensure that integrated housing is built," rather than merely "to enjoin the defendant from interfering with that construction." *Arlington Heights*, at 1293. The underlying principle was a desire to avoid "a massive judicial intrusion on private autonomy." *Id.*

Here counterplaintiffs seek relief that goes far beyond enjoining the SSHC from "interfering" with a particular construction project. They ask the court to permanently enjoin virtually all of the SSHC's programs, including but not limited to affirmative marketing, testing, counseling and Realtor training. (Counterclaim, ¶ 35, p. 14) This would be "a massive judicial intrusion" on SSHC autonomy. Moreover, such intrusion would shut down efforts to promote integration—precisely the kind of efforts that *Arlington Heights* decision was designed to protect.

Therefore the court concludes that the fourth *Arlington Heights* factor weighs in favor of the SSHC.

12. In this case, since all four *Arlington Heights* factors support the SSHC, the court concludes that counterplaintiffs have failed to prove an "effects" case under the Fair Housing Act.

b. *Fair Housing Claim—Intent Analysis*

13. To establish an "intent" case counterplaintiffs must prove that the SSHC denied or made housing unavailable to a person or persons because of race, or otherwise "directly" and "detrimentally" affected the availability of housing because of race. *Steptoe, supra* at 1319; *Phillips v. Hunter Trails Comm. Assn.*, 685 F.2d 184, 199 (7th Cir.1982).

Since counterplaintiffs offered no evidence respecting any persons who sought to purchase or rent homes and who were denied that right by the SSHC, or that the SSHC denied or made housing available to anyone, or in any way restricted or limited anyone's housing choice, the court concludes that counterplaintiffs have failed to prove an "intent" case under the Fair Housing Act.

c. *Section 1982 Claim*

14. Section 1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey any real and personal property."

42 U.S.C. § 1982. "[I]n sharp contrast to" the Fair Housing Act, "42 USC § 1982 is not a comprehensive open housing law," *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 88 S.Ct. 2186, 2189, 20 L.Ed.2d 1189 (1968), but is "limited on its face to discrimination with respect to property rights." *Krieger v. Republic Van Lines*, 435 F. Supp. 335, 338 (S.C.Tex.1977), citing *Jones*.

Moreover, the property right at issue in a Section 1982 claim must (except in extraordinary circumstances not present in the instant case) be the plaintiff's *own* property right. *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 421-22 (4th Cir.1984); *Wilkey v. Pyramid Const. Co.*, 619 F.Supp. 1453, 1455-57 (D.C.Conn.1985).

In addition, "an essential element" of a Section 1982 claim is a showing of "intentional racial discrimination," *Phillips v. Hunter Trails Comm. Assn.*, *supra*, 685 F.2d at 187, seemingly more stringent than the "intent" showing required under the Fair Housing Act. *See, Jones v. Alfred H. Mayer Co.*, *supra*, 392 U.S. at 421-22, 88 S.Ct. at 2193-94 (indicating that a showing of racial animus is required under Section 1982.)

15. The NAR and the GSSBR have failed to establish these "essential elements" of a Section 1982 claim. First, there was no evidence establishing that any person's property rights have been infringed by the SSHC's activities. *See, Steptoe*, *supra* at 1322-23 (housing center "in no way could have impaired . . . property interests" because

homeseekers could obtain any "necessary housing information from traditional commercial channels.")

Second, the NAR and the GSSBR have failed to assert or prove that their *own* property rights have been infringed by the SSHC. No right of the NAR or the GSSBR to purchase, sell or lease property has been referred to.

Finally, there is no evidence in the record that the SSHC engaged in "intentional racial discrimination" of the type deemed essential in *Jones*.

Accordingly, the court concludes counterplaintiffs have failed to establish their Section 1982 claim.

d. *Section 1983 Claim*

16. Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. § 1983. In order to prevail in a Section 1983 claim against the SSHC, counterplaintiffs must show that acting "under color of" state law the SSHC deprived them of rights secured by the Constitution or federal law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, 90 S.Ct. 1598, 1604, 26 L.Ed.2d 142 (1970).

17. In order to establish a violation of Section 1983 counterplaintiffs must also establish that the challenged conduct deprived counterplaintiffs of a right secured by

the Constitution or laws of the United States. Counterplaintiffs have not proved that the SSHC deprived any person of statutory rights. Thus it remains only to consider the possibility of deprivation of a constitutional right.

18. The only constitutional claim apparently raised in Counts I and II of the counterclaim is an equal protection claim. Counterplaintiffs allege that counterdefendants' programs "have the purpose and effect of restricting access to housing, with minority home buyers and renters shouldering most of the burden." (Counterclaim, ¶ 22)

19. Counterplaintiffs clearly have no standing to assert this claim. An equal protection claim would clearly rest on legal rights of minority homebuyers rather than those of homesellers. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 2205; *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100, 99 S.Ct. 1601, 1608. In addition, counterplaintiffs' programs do not restrict access to housing on account of race. (Conclusions of Law, No. 7, *supra*, p. 1087).

20. The court concludes that counterplaintiffs have failed to establish their Section 1983 claim.

FINDINGS OF FACT

COUNT III

"For Sale" Signs

1. Hazel Crest bans the use of real estate "for sale" signs. This ban was enacted as a result of expressions of concern from resident about the community. (Tr.6412-21)

2. University Park repealed its sign ban after trial commenced, replacing the ban with an ordinance that allows one "for sale" sign in a home's window. (DX326,

§ 1272.07(a)(2); DX472) Its declared purpose is "to protect the aesthetically pleasing qualities of the village as a wooded, suburban-rural, and visually open area" and to apply the non-illuminated real estate signs in a residential district that serves as a similar standard as that applicable to political signs. (DX472)

3. Glenwood repealed its sign ban on the eve of trial, replacing it with an ordinance that permits the imposition of limited bans only in specified circumstances. (MX190; DX133, Tr.3319-22)

4. Country Club Hills restricts the use of "for sale" signs in two different ways: first, by regulating the placement and size of these signs, and second, by imposing a fee and permit requirement that applies only to "for sale" signs. (MX11; MX598) In addition, the city has a voluntary sign restraint program designed to "stop some of the [homeseeking] traffic that we have on ride throughs." (DX 479, p. 6; *see* ¶¶ 179-80, *infra*) The declared purpose was "to preserve the proper character of the residential zoning district" and "to regulate the intrusion of commercial signage within residential zoning."

5. Country Club Hills restricts the use of real estate signs to the placement of one sign no larger than three square feet from the house on each property. (MX11) In addition, the city's regulations require that the sign be placed parallel to the front of the house. *Id.*

6. Matteson and Park Forest also regulate the use of "for sale" signs differently from other signs. (DX282; DX290) In Matteson residential real estate signs are limited to a size of eight square feet and five feet in height. In addition, there can only be one such sign on each lot and it must be within fifteen feet of the building. (DX290, p. 112) Its purposes include protecting aesthetic values

and ensuring compatibility with the environment. (DC290) In Park Forest real estate signs are limited to one sign of five square feet or less, including the frame or post, per lot. (DX282, pp. 2-4) Its declared purpose is "to facilitate an easy and pleasant communication between people and their environment by the use of signs which are consistent and harmonious with their environment and the concept of this village as primarily a residential planned community. (Park Forest Code, §§ 31-145)

7. "For sale" signs are a cost effective and valuable form of advertising which benefits homesellers, who get exposure for little cost; homeseekers, for whom signs may be a direct source of information about the availability of homes; and brokers, for whom signs provide a source of sales and a measure to good will advertising. (Tr.2507-58; 2612-13; 3822-23)

8. Assuming that a sign ban, as opposed to regulations might ever be valid, the court finds that Hazel Crest did not meet the extremely difficult burden of proving imminent threat of "sudden and wrenching change" in the community, substantial panic selling; that such a ban would be necessary or effective.

9. The court found little evidence that the sign regulations resulted in measurable lost income for realtors, that the regulations had a discriminatory impact on black homeseekers, or that they denied access to housing to anyone. Therefore the court finds the sign regulations, as opposed to the outright ban of Hazel Crest, are modest and reasonable.

10. A proliferation of "for sale" signs is widely perceived to be destabilizing to an integrated community. (Tr.6942-46) The court therefore finds it reasonable for a municipality to minimize the appearances of "for sale"

sign proliferation so that the community has an opportunity to present the counter message that panic avoidances can lead to a stable integrated community.

CONCLUSIONS OF LAW

a. *Fair Housing Act*

1. Counterplaintiffs' Fair Housing Act challenge to "for sale" sign ordinances (Count III) fails. Hazel Crest prohibits the use of residential "for sale" signs. Country Club Hills, Matteson, Park Forest and University Park merely regulate the time, place and manner of their use.

2. Counterplaintiffs failed to make any credible showing that the "for sale" sign ordinances made housing unavailable to any person because of race and their Fair Housing Act claim fails on that basis alone. Nor did counterplaintiffs establish that the municipalities enacted or administered these ordinances with discriminatory intent. The purposes underlying the Hazel Crest ordinance—the promotion of a stable, racially integrated community—and the purpose of the sign regulations of the other challenged counterdefendants—community aesthetics—clearly are not discriminatory. All of these ordinances are racially neutral and counterplaintiffs adduced no substantial evidence that the stated purposes of the legislation were in any way contrived or pretextual. Nor did counterplaintiffs make a sufficient showing of discriminatory effect or disparate impact under the *Arlington Heights II* standard. 558 F.2d at 1290-93.

3. *First Factor.* Counterplaintiffs failed to demonstrate that the "for sale" sign ban or size and placement ordinances have a racially discriminatory effect or a disparate impact. Very few homeseekers of any race find the house they eventually purchase by viewing "for sale" signs and

the evidence suggests that black homeseekers rely overwhelmingly on real estate agents, rather than signs, to locate properties. Counterplaintiffs have not shown that the effect of the "for sale" sign ordinances is to perpetuate segregation—the other cognizable discriminatory effect recognized in *Arlington Heights II*, 558 F.2d at 1290.

4. *Second factor.* As discussed above, no showing of discriminatory intent has been made with respect to the "for sale" sign ordinances. This element of the *Arlington Heights II* test therefore also weighs against a finding of liability.

5. *Third Factor.* The interest of Hazel Crest in enacting its "for sale" sign ordinance—the promotion of stable, racially integrated neighborhoods—has long been recognized as a significant and legitimate governmental interest. *See*, e.g., *Trafficante*, 409 U.S. at 211, 93 S.Ct. at 367; *Gladstone*, 441 U.S. at 111, 99 S.Ct. at 1613. Nor can there be any question that the interest in community aesthetics of four municipal counterdefendants is also a substantial and legitimate governmental purpose. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08, 101 S.Ct. 2882, 2892-93, 69 L.Ed.2d 800 (1981) (White, J., plurality).

Accordingly, this factor also cuts against any Fair Housing Act liability.

6. Counterplaintiffs have therefore failed to establish their Fair Housing Act challenge to the "for sale" sign ordinances.

b. *Constitutional Challenge*

7. Count III of the counterclaim challenges the "for sale" sign bans and ordinances of the municipal counter-

defendants as violative of the First Amendment and Article I, Section 4 of the Illinois Constitution. The issue is limited here; only Hazel Crest bans the use of residential "for sale" signs. (MX101) However, Country Club Hills, Matteson, Park Forest and University Park regulate the size, placement and number of such signs and counterplaintiffs have challenged those regulations too.

8. The Supreme Court has already struck down a sign ban virtually identical to that of Hazel Crest. In *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 87-88, 97 S.Ct. 1614, 1615-16, 52 L.Ed.2d 155 (1977), an unanimous Supreme Court held that a municipal ordinance banning "for sale" signs violated the First Amendment.

9. The circumstances in *Linmark* were strikingly similar to the facts here. Willingboro was a predominantly white community throughout its early history. By 1970 it had achieved some measure of integration, with a black population of approximately 11.7 percent. By 1973 the black population had risen to 18.2 percent, and Willingboro sought to control the racial change that appeared to be taking place. One of the township's chosen methods was a "for sale" sign ban. *Id.* at 87-88, 97 S.Ct. at 1615-16.

10. Accepting Hazel Crest's contention that a sign ban might be legal under certain rare circumstances, the evidence falls short of demonstrating that the ban is necessary to assure that Hazel Crest remains an integrated community. *Linmark*, 431 U.S. at 95, 97 S.Ct. at 1619. (*See*, Findings of Fact No. 8, *supra*, p. 1090) First, Hazel Crest has offered no evidence that substantial "panic selling" was occurring in the community at all, much less as a result of "for sale" signs. *Id.* In *Linmark*, by contrast, various witnesses testified that real estate signs were a major cause of the "panic selling" that was occurring. *Id.* at 87-88, 97 S.Ct. at 1615-16.

11. Second, Hazel Crest made no showing that the sign ban reduced public awareness of home sales and thereby decreased public concern. *Id.* at 96, 97 S.Ct. at 1620. In *Linmark* the court noted that the sales volume was unchanged after the ban was enacted and concluded that the ban had little impact on the public's concerns. Indeed the court suggested that a ban might actually "fuel public anxiety by increasing homeowners' dependence on rumor and surmise." *Id.* at 96 n. 10, 97 S.Ct. at 602 n. 10.

12. Third, Hazel Crest has not demonstrated that an emergency existed in the community that precluded dispelling public concern over any asserted panic selling through education and the dissemination of additional information. *See, City of Chicago v. Prus,* 117 Ill.App.3d 455, 72 Ill.Dec. 901, 916, 453 N.E.2d 776, 791 (1983). In fact Hazel Crest admits that no areas of the village have ever undergone rapid racial change, contending only that such turnover *could* develop in the future. Such evidence is plainly insufficient to uphold a sign ban. *See, Linmark,* 431 U.S. at 85, 97 S.Ct. at 1615 ("only an emergency can justify repression"); *Prus,* 72 Ill.Dec. at 916, 453 N.E.2d at 791 (necessary to show a "sudden, wrenching change.")

13. Accordingly, the Hazel Crest sign ban violates the First Amendment. Moreover, since the free speech protections of the Illinois Constitution are even broader than those afforded by the United States Constitution, Hazel Crest's ordinance also violates Article I, Section 4 of the Illinois Constitution. *See, Blue Island v. Kozul,* 379 Ill. 511, 41 N.E.2d 515, 520 (1942).

14. The First Amendment tolerates reasonable time, place or manner restrictions of speech such as those of Country Club Hills, Matteson, Park Forest and University Park. *Clark v. Community for Creative Non-Violence,*

468 U.S. 288, 293, 104 S.Ct. 3065, 3068-69, 82 L.Ed.2d 221 (1984). Such restrictions are valid "provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Id.* at 294, 104 S.Ct. at 3069.

15. The "for sale" sign size, placement and manner restrictions contained in the ordinances of Country Club Hills, Matteson, Park Forest and University Park merely regulate but do not prohibit signs. Consequently the time, place and manner standard of *Clark* and therefore the First Amendment is not violated.

16. The "for sale" sign regulations of Country Club Hills, Matteson, Park Forest and University Park also pass the *Clark* constitutional test because they are justified without reference to the content of the regulated speech, they are narrowly tailored to serve a significant governmental interest and they leave open ample alternative channels for communication of the information. *Clark*, 468 U.S. at 294, 104 S.Ct. at 3069.

FINDINGS OF FACT

COUNT IV

Anti-Solicitation Ordinances

1. The municipalities also employ anti-solicitation ordinances in their integration maintenance programs. (MX2; MX4; MX101-02; MX187-88; MX271; MX248; MX382) The ordinances of Country Club Hills, Glenwood, Hazel Crest and Matteson are virtually identical and provide:

"No real estate agent shall solicit any owner or occupant of a dwelling *to sell or rent, or list for sale or rental,* such dwelling at any time after such owner or occupant has notified the [Municipality] that he does not desire to be so solicited.

* * * * * *

"The [Municipality] shall prepare a list of names and addresses of such owners and occupants and shall publish the same as follows:

* * * * * *

(B) By mailing or otherwise delivering a copy of said list annually, to every real estate firm belonging to the local board of realtors . . ."

2. These ordinances define "solicit" or "solicitation" as:

"[A]ny communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is *intended to induce* the sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

"For purposes of this Ordinance the term "solicit" or "solicitation" shall not refer to communications carried out by means of print or electronic media of general circulation, such as newspaper, radio, television or the yellow pages."

3. Park Forest defines solicitation as "any conduct (excluding advertisements in newspapers, magazines or broadcast media of general circulation) designed or intended to

induce the owner of real property . . . to sell, rent, exchange, convey, transfer or list for sale or rental such real property." (MX832, § 24-½-1)

4. Violations of the anti-solicitation ordinances in each of the municipalities except Park Forest are punishable by fines of up to $500. (MX4, § 19.11.01; MX187, §§ 29-39; MX101, §§ 14-57; MX271, § 32.124) Park Forest leaves the nature of its penalty to the discretion of its Village Board. (MX382, § 24-½-25(k))

5. Indeed counterdefendants' witnesses testified that the anti-solicitation ordinances are based on the desire to protect residents from exposure to advertising because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. (Tr.3059; 5255; 6133-35; 6398; 7001) As with "for sale" sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities. (Tr.2082-83; 4459-61)

6. Nevertheless each municipality chose to arrange the list alphabetically by the surnames of residents—not by street name. (DX 195; DX449A; Tr. 3079-80; 6634-35) Compiling the lists in this fashion makes it more difficult for real estate brokers to use directories that are arranged by street name which is a common *modus operandi*. (DX 195, p. 2) Hazel Crest refused a specific request that its list be arranged alphabetically by street address. (Tr. 3747-51)

7. The municipalities' arrangement of the list increased the cost and burden of compliance with the anti-solicitation ordinances and exacerbated the risk of inadvertent violation. (Tr. 3083-85; 4740-42) Because of these risks some brokers have chosen not to solicit, prospect, or farm in

anti-solicitation villages. (Tr. 2601-08; 4728-29; 4734-35; 58782-73)

8. Although it is somewhat more costly to arrange solicitation lists by street, this burden is not sufficient to justify the added burden to the realtors resulting by the failure to do so. (Tr. 3083-85, 4740-42) It appears however that all lists are now organized by street name as a result of pressure of the realtors. (Tr.3079-80; 5789-90; 6401-02; 6405; MX24; MX153; MX199; MX284)[9]

9. In response to the instant case, and the suits challenging Hazel Crest and Matteson's ordinances (Tr. 3809-10), the municipalities acted on the advice of their trial counsel and amended the definition of solicitation contained in their ordinances.[10] (Tr. 3170-73; 5388-90; 5598-5600; 6640-42; DX199; DX222-23; DX267) According to the municipalities this amendment did not cause any substantive change in the definition of solicitation other than to expressly exempt advertisements in general circulation media. (Tr. 6639-40)

10. Widespread solicitation by real estate brokers and salesmen, similar to the "for sale" sign proliferation, is widely perceived to be destablizing to an integrated community. (Tr. 6930-33) The anti-solicitation ordinances are designed to make solicitation more difficult and expensive.

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[9] Counterplaintiffs have filed a motion to reopen and supplement the record to show, *inter alia*, that Country Club Hills had jumbled its 1988 anti-solicitation list. It appears from the response that the list has now been unjumbled. Therefore the motion is denied.

[10] Park Forest did not have the same type of anti-solicitation ordinance as the other municipalities until November 25, 1985. When it enacted its ordinance a definition substantially similar to the one contained in the amendments was included.

11. Another purpose of the anti-solicitation ordinances is to provide a method for a resident to obtain a measure of privacy by avoiding annoying and intrusive inquiries about residential plans.

12. Matteson, Glenwood and Hazel Crest actively publicize the fact that they have an anti-solicitation ordinance; Country Club Hills and Park Forest do not. The result is that the antisolicitation lists of the former are larger than those of the latter. (DX136; DX196; DX201; DX205-06; DX226; DX264; DX272; DX275; MX421)

13. The effect of the anti-solicitation ordinances is greatly exacerbated by the uncertainty of the meaning of the term "solicitation." The counterdefendant municipalities interpret their ordinances to ban all business communication mailed or delivered by real estate brokers, even if their intended purpose was only to generate goodwill, such as holiday calendars, birthday greetings, the sales of investment or vacation property, or to find buyers or referrals.

CONCLUSIONS OF LAW

a. *Fair Housing Act Challenge*

1. The solicitation ordinances are not racially discriminatory, either in intent or in effect. First, the record is devoid of substantial evidence tending to show that the ordinances were intended to discriminate against blacks or any other racial group.

2. Similarly, there is no substantial evidence tending to show that the solicitation ordinances have had a racially discriminatory effect. The purpose of the ordinance is to bar from solicitation only those who request it. Therefore the only families barred from receiving solicitations are

precisely those who are least likely to offer their homes for sale anyway—families (black and white, newcomers and oldcomers) who have affirmatively indicated that they are not interested in moving or selling or listing their homes and do not want to be bothered by real estate salesmen looking for business. The solicitation ordinances are facially neutral and nondiscriminatory as to race and the evidence failed to establish that they are otherwise with regard to effect or result.

3. The foregoing conclusions are buttressed by an application of the *Arlington Heights II* test, 558 F.2d at 1290-93.

4. *First Factor.* Under either of the two species of discriminatory effect set forth in *Arlington Heights II*—disparate impact or furthering segregation—the showing of discriminatory effect here was nonexistent or extremely weak. As indicated above, there was no substantial showing that the solicitation ordinances have a disparate impact on blacks and, by the nature of such ordinances, such an impact is very unlikely.

5. *Second Factor.* Because the court finds that there is no evidence of discriminatory intent with regard to the solicitation ordinance, the second criterion of *Arlington Heights II* also cuts against any finding of liability.

6. *Third Factor.* The interests of counterdefendants in taking the limiting solicitation heavily weighs against a finding of liability. First, it is beyond doubt that the privacy and promotion of racial diversity purposes underlying the solicitation ordinances are significant and legitimate governmental interests. Furthermore, if "the defendant is a governmental body acting within the ambit of legitimately derived authority," it is "entitled to the deference which courts must pay to legitimate govern-

mental action" and the courts "will less readily find that [the] action violates the Fair Housing Act." *Arlington Heights II*, 558 F.2d at 1293. Here the municipal counterdefendants acted within their legitimately derived authority. There was no issue at trial as to the communities' right, pursuant to home rule authority or otherwise, to enact the solicitation ordinances. The claim has been that those ordinances violate federal law, not that they exceeded the lawmaking powers of the Illinois municipalities. Thus the solicitation ordinances and the other municipal enactments in this case deserve the deference of the court.

b. *First Amendment Challenge*

7. The communications sought to be prohibited by counter-defendants' anti-solicitation ordinances constitute commercial speech and they are entitled to "qualified" but nevertheless "substantial" protection by the First Amendment. *Bolger v. Youngs Drug Prdts. Corp.*, 463 U.S. 60, 103 S.Ct. 2875, 2881, 77 L.Ed.2d 469 (1983).

Central Hudson Gas & Electric Corp. v. Public Service, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), established a four-part analysis for asserting the validity of commercial speech.

1) Whether the expression is constitutionally protected;
2) Whether the governmental interest is substantial;
3) Whether the regulation advances the government interest asserted; and
4) Whether it is more extensive than necessary to serve that interest.

8. Under the *Central Hudson* analysis, the anti-solicitation ordinances are unconstitutional as applied to some of counter-defendants' mailings.

The ordinances apply to virtually all mailings of Realtors without regard to being false, deceptive or misleading. Although the government has an interest in protecting the privacy of its citizens who desire such protection and although the government has an interest in promoting the appearance of racial stability and avoiding fears of blockbusting and racial unrest, and preventing mailings from Realtors certainly advances these interests, nevertheless the effect of banning all communication by mail from Realtors is far more extensive than necessary.

The effect of the ordinances as interpreted and enforced by counterdefendants is to prohibit the mailing of mere promotional material from Realtors. The interests claimed by counter-defendants clearly could be met by a much less restrictive ordinance: the banning of solicitations actually seeking to induce the sale, rental or listing of a dwelling would be sufficient to meet the proferred needs of counterdefendants. It is hard to see how communicating the existence of a particular Realtor to a citizen of a community can be detrimental to racial stability of a community.

Frisby v. Schultz, ____ U.S. ____, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988), does not compel a different result. In *Frisby* the Supreme Court upheld an ordinance that barred picketing focused on a single home. In so doing the court focused on the fact that the picketing ban was narrowly tailored to protect the home occupier from a form of message that was particularly "offensive and disturbing." The vice in the ordinances of counterdefendants is that it bans virtually all communications from realtors regardless of content in order to save residents from receiving solicitations to buy their homes. It is not narrowly tailored to effect this purpose because it bans communications, innocent as well as offensive.

9. The ordinances also fail to satisfy due process. The ordinances must be sufficiently explicit to inform those who are subject to them of what conduct is prohibited. *See, Bouie v. Columbia*, 378 U.S. 347, 352, 84 S.Ct. 1697, 1701, 12 L.Ed.2d 894 (1964); *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322 (1926). This vagueness test is particularly stringent in cases where as here the laws in question impinge on constitutionally protected conduct. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620, 96 S.Ct. 1755, 1760, 48 L.Ed.2d 243 (1976).

10. The ordinances define solicitation as any communication "intended to induce the sale, rental or listing" of a dwelling. This definition could be interpreted (and is by counter-defendants) to include virtually anything, such as an exchange of business cards, a friendly chat while showing homes in a neighborhood, introducing new neighbors, or the announcement of the opening of a new office. Therefore the ordinances are unconstitutionally vague on their face. *See, Illinois Ass'n of Realtors v. Village of Bellwood*, 516 F.Supp. 1067, 1075 (N.D.Ill.1981).

11. A substantial question exists as to whether the ordinances cover "indirect" solicitations. The trial testimony showed that by lumping "solicitation" with "advertisement" the municipalities rendered the definition of solicitation hopelessly vague. *See, Coldwell Banker Res. Real Estate v. Clayton*, 105 Ill.2d 389, 86 Ill.Dec. 322, 325, 475 N.E.2d 536, 539 (1985) (statutes should be given their "plain and ordinary meaning.") "Solicitation" means to move to action, to endeavor to obtain by urgent request and implies personal petition to a particular person to do a particular thing (Webster's New Collegiate Dictionary 106 (4th Ed.1977); Black's Law Dictionary 1248-49 (5th Ed. 1979), while "advertising" is the calling of information to

the attention of the public by whatever means (Webster's at 18; Black's at 50).

12. Just before trial the municipalities distributed a letter stating that they believe *every* "business communication" from a real estate broker is a solicitation to list or sell—despite the ordinances' requirement that a communication must be *intended to induce a sale or listing for sale.* The text of the ordinances provide insufficient warning that "indirect" solicitation is prohibited and thus they are unconstitutionally vague.

FINDINGS OF FACT

COUNT V

Data Reporting

1. At the time the NAR and the Board filed their counterclaim in this action, Matteson and Glenwood each had ordinances requiring real estate brokers to report to the villages, *inter alia*, the name, address, telephone number and race of all prospects to whom they had shown properties, the locations of the homes shown to those individuals, the location of homes the prospects offered to purchase, and the address of the home if they ultimately bought. (MX187, Art. V; MX271, Art. V) Each of these ordinances was based on a prototype prepared by the BPI for all of the FHLAC communities. (Tr. 3388-89; DX307)

2. None of the other municipalities has ever enacted a data collection ordinance mandating that brokers provide this information. (Tr. 5162; 6701) To the extent these other villages collect housing data they do so by means of voluntary entrance interview questionnaires distributed to new residents when they sign up for water service. (Tr. 5023-25; 6237-30; 6511)

3. Shortly before trial began both Glenwood and Matteson amended their data collection ordinances on advice of counsel. (MX189; MX275; MX277; DX105) The amendments provided that real estate brokers could omit the names, addresses and phone numbers of their prospects from their reports to the village if they agreed to maintain that data and make it available upon request. Brokers thereafter had the option to provide data only about the race of homeseekers and properties shown in their monthly reports. (MX189, § 11-½-50(d); MX277; § 32.01(C))

CONCLUSIONS OF LAW

COUNT V

a. *Fair Housing Challenge*

1. Although Count V is directed against all the municipal counterdefendants, only Glenwood and Matteson have data reporting ordinances. (MX189, 277) Consequently Count V applies only to those two counterdefendants.

2. Counterplaintiffs claim that the data reporting ordinances of Glenwood and Matteson violate the Fair Housing Act. However there was no evidence that those ordinances ever made housing unavailable to any person on account of race. For that reason alone counterplaintiffs have failed to establish a Fair Housing Act violation.

3. The data collection ordinances require the reporting of homeseeking data for both black and white homeseekers. The information is carefully safeguarded, proper use is defined and the ordinances provide for quasi-criminal penalties for a violation of confidentiality or misuse of the information. No discriminatory purpose or intent underlies these ordinances. In fact they provide information which contributes to the identification of discriminatory real

estate practices so that proper action may be taken. Counterplaintiffs failed to show a single instance when the information was used for any other purpose or was in any way misused. Racial housing information is gathered routinely by other organizations for legitimate purposes. It is a regular part of the United States Census data and the NAR (as part of its VAMA) strongly urges local boards and Realtors to collect and maintain data on the race of homeseekers served. Counterplaintiffs did not establish discriminatory intent, *Phillips*, 685 F.2d at 190, or prove that these ordinances had a discriminatory effect or disparate impact on minorities. *Arlington Heights II*, 558 F.2d 1293-94. Therefore their Fair Housing claim fails.

b. *Constitutional Challenge*

4. Counterplaintiffs assert in Count V that the data reporting ordinances of the municipal counterdefendants stigmatize racial minorities and violate their right to privacy. They also contend that these ordinances violate counterplaintiffs' and their members' right to equal protection and due process and chill their right to free speech. At trial counterplaintiffs failed to substantiate any of these purported effects to third parties, themselves or their members.

Accordingly, the constitutional challenges against the data reporting ordinances fall.

5. The claim of stigmatic injury would fail because the data reporting ordinances are race-neutral and counterplaintiffs have failed to introduce any evidence of discriminatory intent underlying those provisions. *Arlington Heights I*, 429 U.S. at 266, 97 S.Ct. at 564.

6. Counterplaintiffs' assertion that the data reporting ordinances violate minorities' right to privacy is also without merit. First, no one at trial contended that the governmental collection of racial data in and of itself is an invasion of privacy or otherwise wrongful conduct. The Census Bureau as well as the Realtors themselves collect racial data. Courts routinely approve the collection and reporting of racial data. *See*, e.g., *Caulfield v. Bd. of Ed.*, 583 F.2d 605, 611-12 (2nd Cir.1978) (Constitution does not condemn the collection of racial data); *U.S. v. New Hampshire*, 539 F.2d 277, 280-82 (1st Cir.1976), *cert. denied* 429 U.S. 1023, 97 S.Ct. 641, 60 L.Ed.2d 625 (1976) (requirement that state provide racial and ethnic data to federal government is constitutional); *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 957 (10th Cir.1982); *Cf. Whalen v. Roe*, 429 U.S. 589, 605-06, 97 S.Ct. 869, 879-80, 51 L. Ed.2d 64 (1977) (collection and maintenance of data regarding the names and addresses of persons who obtained certain prescription drugs not an invasion of privacy.) The issue rather is the use to which the data is put and the precautions taken to ensure confidentiality.

7. There was no credible evidence at trial that the purposes for which the data are used are improper. Indeed, the evidence was to the contrary, for even as counterplaintiffs' own witness acknowledged, the collection of data to identify disparate impact housing practices and to dispel harmful rumors is useful and proper.

8. Furthermore, the confidentiality precautions undertaken by Glenwood and Matteson prevent any privacy breach against the rights of blacks or anyone else. The ordinances mandate strict confidentiality in the use of the data, precisely define and limit access to the information, and impose substantial penalties for violations. (MX189, § 11-½-53; 277, § 32.015) Glenwood and Matteson village

officials review and analyze the data only in its aggregate form. Besides, the reporting of the identity of homeseekers is not required at all so the opportunities for misuse of information are minimized. The ordinances are carefully structured to ensure that invasions of privacy do not occur; and there was no evidence at trial that any ever have. *See, Whalen*, 429 U.S. at 601, 97 S.Ct. at 877 (no violation to right of privacy where security provisions prevent improper disclosure and access to private data.)

9. As to counterplaintiffs, the data collection ordinances are a type of economic regulation and their equal protection and due process claims, accordingly, are subject to the minimum scrutiny rational basis. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82-84, 98 S.Ct. 2620, 2635-36, 57 L.Ed.2d 595 (1978) (rationality test of state economic regulation applies equally to substantive due process and equal protection claims); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25, 98 S.Ct. 2207, 2213, 57 L.Ed.2d 91, *reh'g denied* 439 U.S. 884, 99 S.Ct. 232, 233, 58 L.Ed.2d 200 (1978). Under that standard "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is reasonably related to a legitimate state interest." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985).

10. The municipalities' interests in data collection—identifying discriminatory practices and dispelling unfounded rumors—clearly are legitimate governmental purposes. Obtaining homeseeker information from Realtors enables the municipalities to monitor compliance with their fair housing ordinances and surely is rationally related to the foregoing purposes. Furthermore, counterplaintiffs failed to offer any credible evidence that these ordinances present any burden to their members, not to mention an unrea-

sonable one. Counterplaintiffs' equal protection and due process challenges therefore fail.

11. Finally, the claim that the data reporting ordinances chill the free speech of counterplaintiffs and their members is unavailing. There was no evidence whatsoever that the data reporting ordinances in any way chilled or even affected counterplaintiffs' or their members' rights to free speech.

FINDINGS OF FACT

COUNT VI

Treatment of Government and Non-Profit Activities

1. In Count VI, counterplaintiffs allege that the municipalities permit governments and not-for-profit organizations to engage in discriminatory activities by excluding these entities from the scope of the Model Ordinances and by proscribing certain real estate practices only if they are performed for profit. (Counterclaim, ¶¶ 79-80) As the court finds below, there is no evidence to suggest a discriminatory purpose or effect as a result of these provisions.

2. The rationale and specific explanation for the challenged provisions is included in the BPI commentary provided to each municipality enacting the Model Ordinance. (*See*, e.g., MX267 at 4-8, 12-13) The "special outreach" proviso is based upon and specifically authorized by the Illinois Human Rights Act and the Illinois Municipal Code, Ill.Rev.Stat., ch. 68, § 7-108(D); ch. 24, ¶ 11-11.1-1 (1985), and is consistent with HUD regulations and practices. (*See*, MX267 at 4-8) Special outreach must be "by or under the authority of" units or local government or non-

profit fair housing agencies to ensure that any such efforts by real estate firms are conducted in compliance with federal, state and local fair housing law. *Id.*

3. Counterplaintiffs' challenge is apparently directed at two provisions of the fair housing ordinances based upon the Model Ordinance. The first is the provision that exempts from the definition of discrimination:

> "Special outreach efforts conducted by or under the authority of units of local government . . . or nonprofit fair housing agencies to ensure that persons of minority groups are fully informed of available dwelling opportunities in areas of present or prospective majority group concentration, or to ensure that persons of the majority group are fully informed of available dwelling opportunities in areas of present or prospective minority group concentration."

(MX4, § 19.2.01; MX101, §§ 14-27; MX187, § 28-4; MX271, § 32.83) The second provision makes it a prohibited act to:

> "For profit, induce or attempt to induce the sale, rental or listing for sale or rental of any dwelling by representations regarding the presence in, proximity to, or entry or prospective entry into, the block, neighborhood or area of a person or persons of a particular race, color, religion, sex, or national origin."

(MX4, § 19.4.01(H); MX101, § 14-29(H); MX187, § 18-13; MX271, § 32.92)

4. The "for profit" panic peddling prohibition is derived from and parallels the Fair Housing Act itself. *Id.* at 10-14.

5. In essence, the court finds that the municipalities have enacted the challenged special outreach and panic peddling provisions for the purpose of following analogous state and federal statutes and not for any invidious or discriminatory purpose. Furthermore, the court finds no

evidence to suggest that non-profit agencies, like the SSHC, or the municipalities have engaged in panic peddling or any other discriminatory conduct allegedly permitted by the wording of the challenged provisions. Accordingly, the court finds no factual basis to support this last claim of counterplaintiffs.

CONCLUSIONS OF LAW

COUNT VI

a. *Fair Housing Preemption Claim*

1. Section 3615 of the Fair Housing Act provides that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. § 3615. Counterplaintiffs contend that municipal counterdefendants' fair housing ordinances violate that provision because they permit steering or other race-conscious activity when performed by government or not-for-profit entities and therefore they are preempted. (Count VI)

2. However state or local legislation will be preempted only if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1941). The preeminence of federal law will be determined from the dominance of the federal interest as stated in the Constitution, *id.* at 62, 61 S.Ct. at 401, or if the regulation is "intertwined with the responsibilities of the national government," *id.* at 66, 61 S.Ct. at 403. The mere fact that Congress has legislated in a particular field "cannot mean . . . that every federal statute ousts all related state law." *Hillsborough Cty. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719, 105

S.Ct. 2371, 2378, 85 L.Ed.2d 714 (1985). Counterplaintiffs have failed to introduce evidence which satisfies either branch of the *Hines* doctrine. Absent such a showing counterdefendants' outreach efforts cannot be considered an obstacle to the goals of the Fair Housing Act; consequently the ordinances are not preempted.

3. Special outreach efforts which further and promote racial integration and diversity are not now and never have been a "discriminatory housing practice" under the Fair Housing Act. Indeed, the promotion of integrated housing and neighborhoods is one of the primary goals of the Act; *Trafficante*, 409 U.S. at 211, 93 S.Ct. at 367; *Gladstone*, 441 U.S. at 111, 99 S.Ct. at 1613; *Arlington Heights II*, 558 F.2d at 1289; *Barrick Realty, Inc. v. City of Gary, Ind.*, 491 F.2d 161, 164-65 (7th Cir.1974).

4. Nor is the prohibition of panic peddling "for profit" in the Model Ordinances adopted by Country Club Hills, Hazel Crest and Matteson offensive to the Fair Housing Act. Indeed, the Model Ordinances parallel the language of Section 3604(e) of the Fair Housing Act by stating:

> "PROHIBITED ACTS
>
> Panic Peddling.
>
> For profit, induce or attempt to induce the sale, rental or listing for sale or rental of any dwelling by representations regarding the presence in, proximity to, or entry or prospective entry into, the block, neighborhood or area of a person or persons of a particular race, color, religion, sex, or national origin."

(MX 271, § 39.92)

5. The Fair Housing Act acknowledges that certain conduct, such as panic peddling, is indigenous to, and particularly egregious in, a commercial setting. *See, U.S. v. Bob Lawrence Realty, Inc.*, 474 F.2d 115, 122 (5th Cir.),

cert. denied 414 U.S. 826, 94 S.Ct. 131, 38 L.Ed.2d 59 (1973) (" '[T]he words "for profit"] . . . were evidently included in § 3604(e) to distinguish and eliminate from the operation of that subsection statements made in social, political or other contexts, as distinguished from a commercial context, where the person making the representations hopes to obtain some financial gain as a result of the representations.' ") (quoting *U.S. v. Mintzes*, 304 F. Supp. 1305, 1312 (D.Md.1969)).

b. *Constitutional Challenge*

6. Counterplaintiffs contend that their rights to equal protection are violated by the distinction in the Model Ordinance communities' fair housing ordinances which permit governmental bodies and non-profit housing centers to engage in special outreach efforts, while such conduct is not permitted for the counterplaintiffs. This distinction does not violate counterplaintiffs' right to equal protection.

7. The standard of review for counterplaintiffs' equal protection claim is the rational basis test. That standard uniformly is applied in cases such as this one involving attacks on social or economic legislation. *See*, e.g., *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254; *U.S. RR Retirement Bd. v. Fritz*, 449 U.S. 166, 174-77, 101 S.Ct. 453, 459-61, 66 L.Ed.2d 368 (1980), *reh'g denied* 450 U.S. 960, 101 S.Ct. 1421, 67 L.Ed.2d 385 (1981); *Vaden v. Village of Maywood*, 809 F.2d 361, 365 (7th Cir.1987). A higher level of scrutiny occurs only upon the implication of a fundamental right or the use of a suspect classification. *Fritz*, 449 U.S. at 174, 101 S.Ct. at 459; *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. Real estate agents are not a suspect class nor does the classification challenged here offend any recognized fundamental right.

8. Under the rational basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne*, 473 U.S. at 440, 105 S.Ct. at 3254. In applying this standard the court considers neither the improvidence of the legislation nor whether its goals could be accomplished more effectively. *Id.*; *Vaden*, 809 F.2d at 365. Rather, in the inquiry simply is "whether the ordinance is wholly arbitrary." *Vaden*, 809 F.2d at 365; *see*, also, Fritz, 449 U.S. at 177, 101 S.Ct. at 460.

9. Applying the rational basis standard here, the fact that the municipal counterdefendants permit special outreach efforts by local governments and non-profit fair housing centers does not offend counterplaintiffs' right to equal protection. Counterdefendants' interest in permitting such efforts—the promotion of diverse integrated communities—is, of course, legitimate. *See, Trafficante*, 409 U.S. 205, 93 S.Ct. 364; *Gladstone*, 441 U.S. 91, 99 S.Ct. 1601; *Barrick*, 491 F.2d 161. Specifically, authorizing outreach efforts by towns or fair housing centers is rationally related to that interest. This conclusion is buttressed by the State of Illinois' specific authorization of such efforts by local governments. Ill.Rev.Stat., ch. 68, ¶ 7-108(D); ch. 24, ¶ 11-11.1-1 (1985). Indeed, given the reality of the dual housing market, diverse integration may not be possible absent such outreach efforts. At a bare minimum it cannot be the case that such efforts either are patently arbitrary or an irrational means of accomplishing the stated interest. No greater showing is required here to defeat counterplaintiffs' equal protection claim. *Vaden*, 809 F.2d at 365.

10. Nor is the equal protection clause offended by the fact that the Model Ordinance communities prohibit panic peddling for profit and prohibit steering by providers of

real estate agent services. Just as Congress in the Fair Housing Act prohibited "for-profit" panic peddling, the municipalities may make the rational determination that panic peddling for profit is most destructive of residential integration. The rational basis for applying the prohibition of steering to real estate providers is equally clear: real estate agents by the intrinsic nature of their business are in daily contact with homesellers and homeseekers. It is surely rational to aim the prohibition on steering at those whose economic and professional positions place them in such direct and frequent contact with those who are subject to steering.

CONCLUSIONS

1. The court finds in favor of the counterdefendants and against the counterplaintiffs on Counts I, II, V and VI.

2. The court finds in favor of counterplaintiffs and against counterdefendant Hazel Crest on Count III and declares the provisions of Ordinance No. 9-1983, Divn. 6, § 14-34, unconstitutional and null and void.

3. The court finds in favor of all other counterdefendants and against counterplaintiffs on Count III.

4. The court finds in favor of counterplaintiffs and against counterdefendants on Count IV and declares the anti-solicitation ordinances of counterdefendants unconstitutional insofar as they prohibit forms of communications from realtors to signators of the municipal anti-solicitation lists other than solicitations actually seeking to induce the sale, rental or listing of dwellings.

IT IS SO ORDERED.

ON MOTION TO ALTER OR AMEND

I. Post-Trial Motion of Plaintiff South Suburban Housing Center

Plaintiff, South Suburban Housing Center ("SSHC"), has moved under Fed.R.Civ.P. 59(e) to alter or amend the court's December 19, 1988 Findings of Fact and Conclusions of Law. It is the expressed intent of SSHC that the court make only changes of a clarifying nature, to correct typographical errors, or to amplify on certain findings and not to seek to have the court alter its ultimate Findings of Fact and Conclusions of Law. Defendants, Greater South Suburban Board of Realtors ("GSSBR") and National Association of Realtors ("NAR"), object to all changes either as unnecessary or as being changes of substance. After reviewing the requests the court declines to make the changes proposed in paragraphs 1, 2, 5, 6, 7 and 8 of SSHC's motion but has changed and substituted Finding of Fact No. 11.

II. Municipalities' Motion

The municipal counterdefendants move the court pursuant to Rule 59(e) of the Fed.R.Civ.P. to amend its judgment and certain of its Findings of Fact and Conclusions of Law only relative to the First Amendment challenge to the municipal counterdefendants' solicitation ordinance (counterclaim, Ct. IV).

Basically the municipalities contend that the court's finding that the solicitation ordinances were unconstitutional because as more extensive than necessary to advance their purposes and were unconstitutionally vague, should be reconsidered in light of the Supreme Court decision of *Rowan v. U.S. Post Office*, 397 U.S. 728, 90 S.Ct. 1484,

25 L.Ed.2d 736 (1970), and the Seventh Circuit decision of *Curtis v. Thompson*, 840 F.2d 1291 (7th Cir.1988).

In *Rowan* the Supreme Court specifically upheld the constitutionality of a federal statute that empowered the post office upon the request of an individual to require that a sender of unsolicited mail remove the name and address of the individual from its mail lists. The *Rowan* case was cited as controlling by the lead opinion in *Curtis*, which upheld the Illinois statute making it a crime to solicit the sale of residential real estate once the owner has given notice that he does not desire to sell (Ill.Rev. Stat., ch. 38, § 70-51(d)). However, both the concurring opinion and the dissenting opinion in *Curtis* distinguished *Rowan* as not being controlling authority (although the concurring opinion felt that *Rowan* was "helpful.")

The court does not find *Rowan* or *Curtis* as authority for the municipalities' position. *Rowan* upheld a statute that permitted a resident to insulate himself from a particular mailer without regard to the content of the mailing. Here, in contrast, the ordinances exclude an entire class of mailers based upon occupation and content. In *Curtis* the plaintiff sought a preliminary injunction barring enforcement of the Illinois Anti-Solicitation Law. The trial court denied the preliminary injunction without holding an evidentiary hearing on the ground that the plaintiff had failed to demonstrate the likelihood of success on the merit. The plaintiff in *Curtis* sought what she claimed was "her First Amendment right to contact homeowners for the purpose of persuading them to sell or list their homes." *Id.*, p. 1297. The court did apply *Central Hudson Gas v. Public Service Com'n of N.Y.*, analysis, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) which resulted in an extremely narrow holding: "Once actual notice is received by a real estate agent, that agent is barred

from contacting the homeowner *for the purpose of persuading him or her to list the residence for sale.*" *Id.*, p. 1304 (emphasis supplied). The Seventh Circuit therefore was not faced with an anti-solicitation ordinance that barred virtually all forms of communication from all realtors to homeowners. Here the court did no more than the majority approval in *Curtis*: a declaration that municipalities had power to prohibit solicitations to sell.

The court therefore denies the motion of the municipalities.

III. GSSBR and NAR Post-Trial Motion

Defendants/counterplaintiffs, GSSBR and NAR (collectively "NAR"), move to amend the judgment pursuant to Rule 59(e) of the Fed.R.Civ.P. and to amend the Findings of Fact and Conclusions of Law pursuant to Rules 59(a) and 60(a) and to amend their second amended complaint, Count VI, to conform to the proof at trial.

A.

The court's judgment of December 19, 1988 inadvertently omitted any rulings on Counts I, II and III of the complaint of plaintiff, SSHC. As pointed out by NAR, the court addressed each of SSHC's counts in the opinion and dismissed the counts in the body of the opinion (p. 1081). Accordingly, the court's judgment is entered in favor of defendants, GSSBR and NAR, and against plaintiff, SSHC, on Counts I, II and III of SSHC's complaint.

B. *Count VI*

NAR points out that the steering ordinances addressed by the court in its opinion at pages 1099-1101 were not

the ones in effect at the time of the trial. These ordinances were however the ones challenged in NAR's second amended counterclaim at paragraphs 78-83. The second amended counterclaim was the pleading at issue at the time the parties went to trial. Fed.R.Civ.P. 15(b) permits post-judgment amendments on the pleadings to conform to the evidence only when the "issues not raised by the pleadings are tried by express or applied consent of the parties." The record of this case is devoid of any evidence of express or applied consent of the municipality. In fact the municipalities filed their proposed Findings of Fact and Conclusions of Law regarding Count VI in conformance with the issues raised by the second amended counterclaim.

In any event the Fair Housing Ordinances which were in effect at the time of the trial are clearly not preempted by the Fair Housing Act. 42 U.S.C.A. § 3615 only invalidates ordinances that purport to require or permit actions that would be a discriminatory housing practice under the Fair Housing Act. None of the ordinances challenged (MX2, MX104, MX277 and MX382) violate the Fair Housing law. The gravamen of defendants' argument is that affirmative marketing, described by NAR as "benign steering", permitted by the Fair Housing Ordinances is a violation of 42 U.S.C. § 3604(e). However the court in its Findings of Fact and Conclusions of Law concerning the Fair Housing Act claims against affirmative marketing (Counts I and II, *see* pp. 1086-88) found no Fair Housing Act violation involved in that type of conduct. Accordingly, the court denies NAR's motion to file the amendment to its second amended complaint to vacate its Findings of Fact and Conclusions of Law on Count VI.

Count III of the Second
Amended Counterclaim

NAR moves the court to set aside its Findings of Fact and Conclusions of Law on the Village of Country Club Hills' sign permit and fee ordinance. NAR argues that the Country Club Hills' sign ordinance is specifically limited to real estate "for sale" signs, is not content neutral, and therefore the court time, place, or manner analysis is incorrect.

However the evidence submitted showed that Country Club Hills charged a fee and required an application for a permit for other commercial signs in residential areas (Country Club Hills Code, Art. 11, § 15.11.08(1), MX598 and MX599). There was no evidence that the fees charged exceeded the administration costs. Accordingly, the motion of NAR to vacate the judgment in favor of the municipalities on Count III of the second amended counterclaim is denied.

At the suggestion of the realtor the court has looked at Finding No. 9 on page 1080 of the court's December 19, 1988 opinion. It was the intent of the Finding of Fact that the relief sought, being the forced inclusion of listing agreements into defendant's MLS, would affirmatively further fair housing activity although the court did not feel that this was a severe intrusion into defendants' rights. Accordingly, the factor was not determinative. *Arlington Heights*, at 1295.

IT IS SO ORDERED.

[Docketed July 24, 1989]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SOUTH SUBURBAN HOUSING CENTER,

Plaintiff,

v.

GREATER SOUTH SUBURBAN BOARD OF REALTORS®, et al.,

Defendants.

No. 83 C 8149 — Hon. Harry D. Leinenweber

AMENDED JUDGMENT

This action having come to trial before the Court, the issues having been tried and the Court's decision rendered, IT IS ORDERED AND ADJUDGED

That the Court's Judgment of April 27, 1989 be and is amended *nunc pro tunc* to read, as amended:

> Judgment is entered in favor of defendants Greater South Suburban Board of Realtors® and National Association of Realtors® and against plaintiff South Suburban Housing Center on Counts I, II, III, IV and V of the Complaint.
>
> Judgment is entered in favor of the counterdefendants and against the counterplaintiffs on Counts I, II, V and VI of the counterclaim. Judgment is entered in favor of counterplaintiffs and against counterdefendant Village of Hazel Crest with respect to counterplaintiffs' constitutional claims contained in Count III of the counterclaim and the court declares

the provisions of Ordinance No. 9-1983, Divn. 6, section 14-34, unconstitutional and null and void. Judgment is entered in favor of counterdefendants City of Country Club Hills, Village of Glenwood, Village of Hazel Crest, Village of Matteson, Village of Park Forest and Village of University Park and against counterplaintiffs with respect to all other claims contained in Count III. Judgment is entered in favor of counterdefendants and against counterplaintiffs with respect to the Fair Housing Act claims contained in Count IV of the counterclaim. With respect to the constitutional claim contained in Count IV, judgment is entered in favor of counterplaintiffs and against counterdefendants as follows: the court declares the provisions of Ch. 19, Art. 2, Sec. 19.2.01(L) and Ch. 19, Art. 5, Secs. 19.6.01 and 19.6.02 of the Country Club Hills City Code; Ch. 28, Art. IV, Sec. 28-21 of the Village Code of Glenwood; Ch. 14, Art. III, Divn. 1, Sec. 14-27(M) and Divn. 4, Sec. 14-32 of the Village Code of Hazel Crest; Ch. 32, Art. IV, Sec. 32.100 of the Village Code of Matteson; Ch. 24½, Art. I, Sec. 24½-1 and Art. II, Secs. 24½-2, 24½-3 of the Village Code of Park Forest unconstitutional insofar as they prohibit forms of communications from realtors to signators of the municipal anti-solicitation lists other than solicitations actually seeking to induce the sale, rental or listing of dwellings.

/s/ H.D. LEINENWEBER

Date: July 21, 1989
nunc pro tunc 4/27/89

ORDINANCES INVOLVED

University Park

University Park's Real Estate Sign Ordinance (Section 1272.07(a)(2)) provides:

Except for the sale of unimproved parcels of land of five acres or more, no real estate sign shall be erected, exhibited, displayed or maintained outdoors in a residential district; however, a real estate sign, including a for sale sign, may be placed in a window of a residential dwelling.

Country Club Hills

Country Club Hills' Real Estate Sign Ordinance (Section 15.11.11 "Real Estate Signs") provides:

Signs that have for their purpose or intent the selling or renting of real estate located in residential zoning district, such as, but not limited to signs that contain words "for sale", "for rent", or any similar language shall conform with the following provisions:

A. No more than one real estate sign shall be erected on any premises.

B. No real estate sign shall exceed three square feet in area and the top surface shall not exceed three feet above existing grade at the point of erection.

C. Real estate signs shall be erected parallel to the front side of any building and shall be placed no more than 3 feet from the front foundation wall.

D. Prior to erection of any real estate sign, the owner of any property within the city or his agent shall file an application in accordance with the provisions of Chapter 14 of this Code.

E. No real estate sign shall contain the words "sold", "leased", or any similar language.

F. No real estate signs shall be an illuminated sign.

Matteson

Matteson's Real Estate Sign Ordinance (Section 159.55.11) provides:

(11) *Residential For Sale or For Rent Signs.* Residential For Sale or For Rent signs are exempted to the extent that they conform to the following regulations:

(a) *Illumination.* Such signs shall not be illuminated.

(b) *Size.* No such sign shall exceed 8 square feet (0.74 square meters) in area.

(c) *Location.* All signs shall be located on the lot that they are advertising. No such sign shall be placed more than 15 feet (3.05 meters) from the building line.

(d) *Height.* No such sign or supporting structure shall project higher than 5 feet (1.53 meters) above ground level at that point where it is located.

(e) *Number.* There shall not be more than 1 sign per lot.

Park Forest

Park Forest's Real Estate Sign Ordinance (Section 31-147 "Exempt Signs") permits only:

One non-illuminated "for sale" or "for rent" sign, per parcel of real estate, provided that the sign be placed on such parcel being offered for sale or rent. In residential districts, the sign area may not exceed five (5) square feet. In commercial and industrial districts, the maximum sign area may not exceed twenty (20) square feet, and advertise exclusively the sale of the land or building upon which the sign is displayed, provided:

(1) Such sign states the date on which said sign was erected;

(2) No "sold" sign may be erected unless it replaces a previously existing "for sale" sign; and

(3) "Sold" signs shall be removed upon closing of a sale.

Park Forest

Sec. 24½-2. Solicitation.

(a) It shall be an unfair real estate practice for any real estate agent, broker or salesperson to engage in solicitation without first having:

(1) Met with the village manager (or his designated representative) to discuss briefly the solicitation and its compliance with this chapter, such meeting to occur no more than three (3) business days after requested unless the requesting person agrees to a later date.

(2) Provided to the village manager one copy of each brochure, letter, or other written or printed material to be shown, given or sent to any person solicited; and

(3) Submitted to the village manager on a form provided by the village the following information:

a. The name, address, telephone number and real estate license number of each person who will be participating in the solicitation;

b. The general location to be solicited;

c. The time interval of solicitation;

d. The means of solicitation, e.g., written material by mail, written material left at door, telephone, personal visit to home.

(b) In the event there is any change in the information submitted to the village manager pursuant to (a) above notification of such change must be submitted to the village manager within thirty (30) days of its occurrence.

(c) The village manager may at any time, but in any event no more frequently than six (6) months, request verification of any information provided pursuant to (a) above, such verification to be provided within thirty (30) days of such request. (Ord. No. 1322, § 2, 11-25-85)

Sec. 24½-3. Request for nonsolicitation.

(a) No real estate agent, broker or salesperson shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the village clerk that he/she does not desire to be so solicited. Such notification shall remain in effect until such time as said owner or occupant instructs the village clerk otherwise, or the property owned by such person is advertised for sale or rent by use of a sign or any other form written publication.

(b) The village clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The clerk shall prepare a list of the names and addresses of such owners and occupants and shall update such list no less than annually during the month of January and shall publish the same as follows:

(1) By maintaining a copy of said list in the office of the village clerk and making it available for inspection.

(2) By furnishing a copy of said list annually to every real estate firm belonging to the local multiple-listing service.

(3) By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in the village. (Ord. No. 1322, § 2, 11-25-85)

Country Club Hills

19.6.01. SOLICITATION.

No person shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the City Clerk of Country Club Hills that he does not desire to be so solicited.

The City Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The City Clerk shall prepare a list of names and addresses of such owners and occupants both alphabetically and by street address and shall publish the same as follows:

A. By maintaining a copy of said list in the office of the City Clerk of the City of Country Club Hills and making it available for inspection;

B. By furnishing a copy of said list annually to every real estate agent belonging to the local multiple-listing service, and by posting quarterly the additions and deletions to the list at the City Hall; and,

C. By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in Country Club Hills.

19.6.02: Any owner or occupant of a dwelling may notify, in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

The Country Club Hills Ordinance was amended as follows:

Section 19.2.01. DEFINITIONS.

L. "Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

For purposes of this Ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means of print or electronic media of general circulation, such as a newspaper, radio, television or the yellow pages.

Matteson

Section 32.100. Solicitation.

No real estate agent shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Village of Matteson Clerk that he does not desire to be so solicited.

The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants and shall publish the same as follows:

A) By maintaining a copy of said list in the office of the Village of Matteson Clerk and making it available for inspection;

B) By mailing or otherwise delivering a copy of said list annually to every real estate firm belonging to the local board of realtors; and

C) By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in Matteson.

In addition, any owner or occupant of a dwelling may notify, in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

"Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing of such dwelling, (ii) which is intended to offer or promote services in connection therewith, and (iii) which is carried out by means of any of the following:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling such as direct mail, leaflets or pamphlets; and

(c) telephonic contacts with the owner or occupant of the dwelling.

For purposes of this ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means of print or electronic media of general circulation such as newspapers, radio, television or the yellow pages.

"Real estate agent" means any person who for consideration negotiates or attempts to negotiate the purchase, sale, rental or listing of a dwelling or interest therein, including, but not limited to, all persons licensed or required to be licensed pursuant to the provisions of the Illinois Real Estate License Act, *Ill.Rev.Stat.*, Ch. 111, ¶ 5801 *et seq.*

Hazel Crest

DIVISION 4; SOLICITATION

Section 14-32. Solicitation.

No person shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Hazel Crest Village Clerk that he does not desire to be so solicited.

The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants and shall publish the same as follows:

A. By maintaining a copy of said list in the office of the Village of Hazel Crest Clerk and making it available for inspection;

B. By furnishing a copy of said list annually to every real estate firm belonging to the local multiple-listing service;

C. By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in the Village of Hazel Crest.

In addition, any owner or occupant of a dwelling may notify, in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

Section 14-27 of the Hazel Crest Ordinance was amended as follows:

"Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the

sale, rental or listing for sale or rental of such dwelling; (ii) which is intended to offer or promote services in connection with the sale, rental or listing of such dwelling; and (iii) which is carried out by means of:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling, such as direct mail, leaflets or pamphlets; or

(c) telephonic contacts with owners or occupants of the dwelling.

For purposes of this Ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means of print or electronic media of general circulation, such as a newspaper, radio, television or the yellow pages.

Glenwood

ARTICLE IV; SOLICITATION

Section 28-21. Solicitation.

No real estate agent shall solicit any owner or occupant of a dwelling to sell or rent, or list for sale or rental, such dwelling at any time after such owner or occupant has notified the Village Clerk that he does not desire to be so solicited.

The Clerk shall publish and make available, without charge, appropriate forms which may be executed by any owner or occupant of a dwelling to provide such notice. The Clerk shall prepare a list of the names and addresses of such owners and occupants shall publish the same as follows:

A) By maintaining a copy of said list in the office of the Village Clerk and making it available for inspection;

B) By mailing or otherwise delivering a copy of said list annually, plus a quarterly list of additions and deletions, to every real estate firm belonging to local mutliple-listing service; and

C) By furnishing a copy of said list upon request and payment of reproduction costs to any person having an interest in the sale or rental of any dwelling in the Village.

In addition, any owner or occupant of a dwelling may notify in writing, any real estate agent that such owner or occupant does not desire to be solicited. Upon such notice, a real estate agent shall not solicit such owner or occupant to sell or rent, or list for sale or rental, such dwelling.

"Solicit" or "solicitation" means any communication by or on behalf of a real estate agent with the owner or occupant of a dwelling (i) which is intended to induce the sale, rental or listing of such dwelling, (ii) which is intended to offer or promote services in connection therewith, and (iii) which is carried out by means of any of the following:

(a) in-person contacts at the dwelling;

(b) written material mailed or delivered directly to the dwelling such as direct mail, leaflets or pamphlets; and

(c) telephonic contact with the owner or occupant of the dwelling.

For purposes of this ordinance the term "solicit" or "solicitation" shall not refer to communication carried out by means or print or electronic media of general circulation such as newspapers, radio, television or the yellow pages.

"Real estate agent" means any person who for consideration negotiates or attempts to negotiate the purchase, sale, rental, or listing of a dwelling or interest therein, including, but not limited to, all persons licensed or required to be licensed pursuant to the provisions of the Illinois Real Estate Brokers and Salesmen Act, *Ill.Rev. Stat.*, Ch. 111, Sec. 5701 *et seq.*

(3)

No. 91-925

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation, and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT SOUTH SUBURBAN HOUSING CENTER

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QUESTIONS PRESENTED

I. Is *certiorari* appropriate for an issue which no federal court, including the lower courts in this case, has ever decided?

II. Does an organization of real estate brokers have third-party standing to assert the equal protection rights of minority homeseekers absent evidence that such homeseekers are unable to advance their own interests and in spite of extensive evidence of racial discrimination by real estate brokers?

III. Is a municipality's approval of a real estate marketing plan that is proposed, drafted, implemented and funded entirely by private parties sufficient to render those parties state actors and thereby open the door to an equal protection claim under 42 U.S.C. Section 1983?

IV. Does a real estate marketing plan designed to attract members of all racial groups to available housing, which does not restrict or limit any racial group's access to or information about available housing, violate the Equal Protection Clause merely because it is race-conscious?

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No. 91-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation, and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT SOUTH SUBURBAN HOUSING CENTER

The Petition for Writ of Certiorari presents four questions, only the fourth of which directly concerns Respondent South Suburban Housing Center (the "Housing Center" or the "Center"), a private, not-for-profit fair housing agency:[1] the constitutionality of the affirmative marketing plan ("AMP") developed by the Housing Center for the sale of its three homes on Apache Street in Park Forest, Illinois. (The AMP is reproduced in the appendix to this Brief.) This Brief in Opposition addresses only that question. The Housing Center respectfully submits that, as it relates to that question, the Petition for Writ of Certiorari should be denied.

RESTATEMENT OF THE CASE

Through material omissions and several misstatements the Petition so distorts the facts as to necessitate this Restatement.

Two omissions deserve special note. First, the Petitioners ("the Realtors") fail to acknowledge that, in ruling that the AMP complies with the Fair Housing Act, the District Court made findings of fact (affirmed by the Court of Appeals) that directly contradict the assertions in the Petition on which the Realtors base their Section 1983 equal protection claim. Whereas the Petition asserts that the AMP "manipulate[s] the housing decisions of prospective residents" (p. 15), "preserve[s] the racial balance preferred by the white majority" (p. 27), provides for "preferential treatment of white homeseekers" (p. 28), and restricts housing information to black homeseekers (p. 13), the District Court found that there was "no evidence at all" that

[1] The Housing Center, an Illinois not-for-profit corporation, has no parent or subsidiary.

the broker, Motluck, in any way reduced his efforts to market the Apache Street properties to blacks (NAR App., p. 75),[2] that there was "no evidence at all" that the Housing Center intended Motluck to do so (*id.*), that "[t]here was no evidence presented" that the purpose of any Center activity was to restrict the access of any racial group to housing, "manipulate choice, or otherwise impose a quota on any racial group" (*id.* at 95), that the Realtors "failed to show" that the effect of any Center activity was to restrict minorities' access to housing (*id.* at 98), and that the Realtors "offered no evidence" that the Center denied housing to anyone or "in any way" restricted or limited anyone's housing choice (*id.* at 101). In affirming the District Court, the Court of Appeals stated:

> "[The Housing Center's] affirmative marketing plan in no way deters black home buyers from pursuing their interest in the Apache Street homes; it merely creates additional competition in the housing market." (NAR App., p. 28.)

Second, the Realtors fail to acknowledge that the AMP is an "ordinary and traditional" affirmative marketing plan of the type mandated in regulations and handbooks of the United States Department of Housing and Urban Development ("HUD") since 1972. (Tr. 1240-43, 1249-50, K. Williams.) As shown below, HUD has for twenty years required owners of federally subsidized housing, and encouraged others (including builders, real estate brokers and landlords), to carry out such affirmative marketing, including special outreach to white homeseekers where appropriate; numerous state and local governments likewise require or encourage affirmative marketing. Thus, the Apache Street

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[2] The Appendix to the Petition for Certiorari will be cited as "NAR App., p. ____." The appendix to this brief will be cited as "HC App., p. ____."

AMP is part of a venerable national tradition of affirmative marketing.

In this context we correct or supplement the Statement of Facts in several additional areas.

What Is Affirmative Marketing?

Affirmative marketing means taking special steps to provide information about available housing to persons of racial groups who, absent such efforts, would be unlikely to know of the availability of, or feel welcome to apply for, the homes or apartments being offered. (NAR App., pp. 73, 93-95; *see* HUD's Affirmative Fair Housing Marketing Regulations, 24 CFR §200.600 et seq., PX51,[3] and implementing Handbooks, PX21 and PX65.) Such steps are taken in addition to, and without curtailing, normal marketing activities. (NAR App., p. 99.) They consist of advertising in selected media or locations, and providing relevant information through local organizations such as churches, labor unions, employers, and the like. (PX65, Appendix 4, p. 3.) The purpose is to assure that persons normally not likely to apply for the housing being marketed, because of existing neighborhood racial or ethnic patterns or other factors, know about the housing, feel welcome to apply, and have the opportunity to buy or rent. (*Id.*) Among other things, such marketing involves efforts to attract whites to racially integrated areas as well as blacks to racially segregated white areas. (NAR App., p. 69.)

Affirmative marketing, which thus broadens—and does not limit—housing choices, is quite distinct from "affirm-

[3] Plaintiffs' exhibits in the trial court are referred to as "PX ____"; the Realtors' exhibits as "DX ____"; and the Municipalities' exhibits as "MX ____."

ative action" programs that may limit choice. The Court of Appeals explained the fundamental difference:

> "In contrast to the subordination of the goal of equal housing opportunity to the goal of integration presented by the facts in *Starrett City* and *Charlottesville*, the Realtors' challenge to the Apache Street affirmative marketing plan presents the question of whether a real estate organization may engage in limited race conscious marketing which does not exclude minorities from housing opportunities. Thus, we are not dealing with conflicting goals, for the affirmative marketing plan furthers the goal of integration while providing equal opportunities to all." (NAR App., pp. 26-27.)

HUD emphasized the non-burdensome and nondiscriminatory nature of affirmative marketing when it stated, in a recent review of the fair housing programs of one of the respondent municipalities in this case, that programs which ensure that:

> "blacks may be fully informed of housing opportunities in those sections of the city where blacks are least concentrated, and whites may be fully informed of housing opportunities in those sections of the city where whites are least concentrated . . . is patently neither discriminatory nor a violation of Title VIII and there is not the slightest implication that any information regarding housing opportunities may be denied." 53 Fed. Reg. 26,318 (1988) (citation omitted).

HUD initiated affirmative marketing in 1972 when it issued its Affirmative Fair Housing Marketing Regulations (the "AFHM Regulations," PX51, 24 CFR §200.600 et seq.). Those regulations, which have been in effect continuously since their issuance, mandate that private and governmental participants in various federal housing programs shall:

> "carry out an affirmative program to attract buyers or tenants, regardless of sex, of all minority and ma-

> jority groups to the housing for . . . sale or rental." (PX51, §200.620(a).)

See, e.g., 24 CFR §§880.601(a), 881.601(a), 882.111 and 883.312. HUD's first Handbook implementing the AFHM Regulations instructed applicants to:

> "State which group(s), in your judgment, are normally *not* likely to apply for the housing without special outreach because of factors such as existing neighborhood racial or ethnic patterns, price, and other factors." (PX21, Appendix 2, p. 1.)

The instructions further stated:

> "The [affirmative marketing] program should include efforts to reach those persons who traditionally would not have been expected to apply for the housing. For instance, for housing in a white suburban area, special steps may be needed to make its availability known to minorities; similarly, if the housing is located in an area of minority concentration, special steps may be needed to make its availability known to whites." (*Id.* at 3.)

Subsequent Handbooks have been substantially similar. (*See* PX65.) Pursuant to the AFHM Regulations and Handbooks, thousands of affirmative marketing plans or programs have been implemented involving special outreach to both blacks and whites. (Tr. 7553, K. Williams.)

Affirmative marketing has also been widely employed in federal, state and local government programs not subject to the AFHM regulations, and in the private sector. For example, HUD has encouraged voluntary affirmative marketing in the private housing market through voluntary affirmative marketing agreements ("VAMAs") with HUD. HUD's VAMA with the National Association of Homebuilders, whose members are responsible for building approximately 75% of the new single-family homes in the country (Tr. 7562, K. Williams), provides:

> "Each *Builder* shall direct a substantial part of its marketing activity to those groups which are not likely to seek housing marketed by the Builder without special outreach: i.e., to racial minority groups for housing in predominantly non-minority areas, and to racial majority groups for housing in integrated areas." (PX66, p. 4, §4(d).)[4]

State and local government agencies have also required, authorized or encouraged affirmative marketing to both whites and minorities. For example, the Illinois General Assembly has specified that units of local government may make:

> "special outreach efforts to inform members of minority groups of housing opportunities available in areas of majority white concentration and make similar efforts to inform the majority white population of available housing opportunities located in areas of minority concentration." (24 *Ill. Rev. Stat.* §11-11.1-1; 68 *Ill. Rev. Stat.* §7-108(D).)

The Apache Street Affirmative Marketing Plan

To address the "ongoing problem" of blight caused by vacant and abandoned homes, Park Forest in 1982 began a program of acquiring such homes, rehabilitating and reselling them. (NAR App., p. 72.) The ordinance creating the program did not mention (much less require) affirmative marketing. (PX 12.) Pursuant to that program Park Forest purchased the vacant homes at 9, 15 and 26 Apache Street. (NAR App., p. 72.) In a public notice it then

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[4] A VAMA has also been entered into between HUD and NAR (the "HUD/NAR VAMA"). The HUD/NAR VAMA neither requires nor prohibits race-conscious affirmative marketing. (PX48, pp. 21-26; Tr. 2331, North.) HUD proposed that the agreement be amended to require such marketing, but NAR did not agree to the proposed amendment. (PX50; Tr. 3435-37, North.)

sought bidders to purchase, rehabilitate and resell the three homes. (PX13.) The notice did not mention affirmative marketing. (*Id.*)

The Housing Center submitted a proposal for all three homes. Based on its analysis of various data, the Center determined that without special outreach efforts few white homeseekers would be attracted to the homes. (NAR App., p. 73.) Consequently, the Housing Center's proposal included affirmative marketing. On November 1, 1982, the Park Forest Board of Trustees voted to accept the Center's proposal, and the Center then bought the homes and began rehabilitation. (*Id.*)

Soon thereafter the Housing Center listed the homes with real estate broker Motluck, who agreed to affirmatively market them. (NAR App., p. 73.) The Housing Center and Motluck jointly developed an affirmative marketing plan that was incorporated into the listing agreements. (*Id.*) The agreements were then submitted to the Park Forest village manager, who reviewed and approved them as consistent with the Housing Center's proposal. (NAR App., p. 74.)

The Apache Street AMP was an "ordinary and traditional" plan of the type prescribed by HUD's regulations. (Tr. 1240-43, 1249-50, K. Williams.) It provided that Motluck was to use his "best efforts to attract minority and majority persons" to the Apache Street homes, and to that end conduct special outreach to whites by advertising in newspapers with a predominantly white circulation and distributing information to rental developments and employers where whites could be reached. (HC App., p. 1.)

The AMP required Motluck to provide all of his clients with a full range of housing options throughout the South Suburban area, and specifically to "assure that each client is informed about available dwellings in neighborhoods in

which persons of the client's race are not likely to be attracted without special outreach efforts." (HC App., p. 2.) It did not provide for or permit "preferential treatment" of white homeseekers as the Realtors assert. (Pet., p. 28.) To the contrary, the plan forbade "any action which prohibits, restricts, narrows or limits the housing choice of any client on the basis of race." (HC App., p. 2; NAR App., p. 73.)[5]

The Housing Center's purpose in entering into the Apache Street listings, as the District Court found, was not to decrease or restrict black traffic but to add "white traffic to the properties in addition to the black traffic." (NAR App., p. 93.) The District Court said there was no evidence at all that the Center intended Motluck to reduce, or that Motluck in any way did reduce, his efforts to market the Apache Street properties to blacks. (*Id.* at 75.) The evidence was that special outreach to whites was in addition to Motluck's "normal advertising" for the Apache Street homes. (Tr. 326, Klepper.) Motluck's records showed that of 27 homeseekers, 25 were black. (PX41.)

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[5] The Realtors refer to training materials that they say "instructed Realtor Motluck's sales agents not to tell blacks about the Apache Street homes unless asked about them specifically." (Pet., p. 13.) In fact, (1) the cited exhibit was never used in training because the Housing Center's director found it was "incorrect" (Tr. 1042); (2) it contains no such statement about the Apache Street homes (DX62); and (3) there is no evidence that Motluck's agents were ever so instructed. To the contrary, the corrected training materials that *were* used instructed Motluck's agents that black homeseekers who expressed no preference for a particular area should be offered listings in both integrated neighborhoods (which include Apache Street) and predominantly white neighborhoods. (PX 27.)

Park Forest's Non-Participation In The Initiation And Implementation Of The Apache Street Affirmative Marketing Plan

The Realtors state that the Apache Street AMP was "enacted by Park Forest" (Pet., p. 27), quoting testimony of former Park Forest Village President Ron Bean (Pet., p. 12) that may be read as mistakenly suggesting that Park Forest initiated the AMP. The quotations are excerpted from lengthy narrative responses to questions not about who initiated the affirmative marketing, but rather about Park Forest's views concerning demographics on Apache Street. (Tr. 795-97, Bean.)

When Bean was asked specifically about the respective roles of the Housing Center and Park Forest, he testified: (1) the proposal for affirmative marketing came from the Housing Center in its bid to purchase the Apache Street homes (Tr. 711-12); (2) the details of the AMP were developed entirely by the Housing Center and Motluck (Tr. 688, 699, 700, 713); and (3) the AMP was never presented to or approved by the Park Forest Board of Trustees. (Tr. 687.)

It is undisputed that the AMP was to be implemented entirely by Motluck. (NAR App., pp. 73-74.) There is no evidence that Park Forest provided any funding for those implementation efforts. Moreover, in Proposed Findings of Fact to the District Court, the Realtors admitted that the Village Manager's approval of the AMP was done "without consultation or authorization from the Park Forest board of trustees" and "did not convey any judgment on the substance of the affirmative marketing agreement; it was merely an acknowledgment . . . that the plan called for affirmative marketing, as the Center's proposal indi-

cated that it would." (NAR and GSSBR's Proposed Findings of Fact, p. 29.)[6]

In sum, as the Realtors' Proposed Findings of Fact conceded,[7] Park Forest's only role in the Apache Street AMP was to approve a plan that was developed and proposed, and was to be implemented and funded, by the Housing Center and Motluck.

The Housing Center's Efforts To Open Housing Opportunities For Black Homeseekers

The Realtors portray the Housing Center as devoted primarily to attracting white homeseekers to the South Suburbs. (Pet., pp. 3, 13-14.) In fact, the District Court found that one of the Center's primary purposes is to promote open housing to all regardless of race and that the Center's testing and litigation activities had been "designed to 'open up' housing options and combat discrimination *particularly with respect to blacks.*" (NAR App., pp. 65, 92, emphasis added.)

The Housing Center's board and staff have "always been interracial." (Tr. 184, Klepper.) During the first two or three years of the Center's existence, its activities were designed primarily "to help minority families make

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[6] The Housing Center/Park Forest "contract" consisted of the Housing Center's proposal and Park Forest's acceptance of that proposal by resolution; the parties did not negotiate or execute a separate document.

[7] The Realtors' Proposed Findings of Fact stated that (1) "SSHC had already decided to employ special outreach to whites by the time it submitted its proposal to Park Forest"; (2) "Park Forest did not hold any hearings or make any legislative findings" regarding the need for affirmative marketing on Apache Street; (3) "The Park Forest resolutions authorizing the sale of the Apache Street homes to SSHC do not authorize or mandate affirmative marketing for the properties"; and (4) "SSHC and BPI drafted the Apache Street Affirmative Marketing Plan." (NAR and GSSBR's Proposed Findings of Facts, pp. 28-29.)

open housing moves" in the South Suburbs. (Tr. 187-88, Klepper.) Even after the Housing Center broadened its activities in 1978 to include "encouraging whites to invest in racially diverse communities" (Tr. 201, Klepper), it expanded its enforcement activities on behalf of minority homeseekers, who continued to comprise fully two-thirds of the Center's clients. (Tr. 202, 286, Klepper.)

The Housing Center's Leadership In Affirmative Marketing To Black Homeseekers

The most egregious of the Realtors' misstatements is that the Housing Center's promises of outreach to blacks as well as whites "evaporated" and that the "only outreach to blacks undertaken by [the Center] was a newspaper advertisement" relating to the Southwest Suburban area. (Pet., pp. 13-14.)

In fact, the evidence is that the Center provided assistance to South Suburban apartment complexes in affirmative marketing to blacks as well as whites (Tr. 258-59, Klepper); that at its seminars for Realtors the Center suggested South Suburban locations appropriate for special outreach to black as well as white homeseekers (Tr. 218-26, Klepper; PX26; PX27); and that in one document used in such seminars the Center identified no fewer than 44 South Suburban areas for which special outreach was needed to minority homeseekers. (PX27.) The only Park Forest location listed for affirmative marketing to whites was Apache Street. (PX27.) Moreover, in lawsuits on behalf of black victims of discrimination, the relief sought by the Center and ordered by the courts has included affirmative marketing to minority homeseekers. (Tr. 300-01, Klepper.)[8]

[8] The Housing Center has not acquired any homes since its purchase of the Apache Street homes and has thus had no further opportunity to affirmatively market its *own* properties.

Racial Change On Apache Street

The Realtors assert that concerns about the threat of resegregation on Apache Street were based on "misperceptions." (Pet., p. 5.) In fact, the evidence demonstrated a dynamic and continuing process of racial change in which discriminatory practices by real estate brokers played an important role.

In 1970, the Forest Heights subdivision was built immediately north of the Apache Street area and most of the homes were sold to blacks. (NAR App., p. 71.) By 1972 the Forest Heights population was 99 percent black. (*Id.*) Racial turnover then occurred in the Beacon Hill subdivision, which adjoins both Forest Heights and the Eastgate subdivision of which Apache Street is a part. (*Id.*) During 1970-71 the school serving Beacon Hill, Forest Heights and Apache Street changed from 25 to 90 percent black, becoming the only racially identifiable school in Park Forest. (*Id.* at 71-72.) Racial steering then occurred on Apache Street itself—"brokers began to steer whites away from the area." (*Id.* at 72.) Although the situation did stabilize somewhat, 1980 census figures revealed that the Apache Street census block had reached more than double (56 percent) the black population of any other census block in its Eastgate subdivision. (*Id.*)

By the time this action was brought in 1983, Apache Street had had "very little white demand for housing for some time." (NAR App., p. 72.) Homeseeking traffic was "predominantly black." (*Id.*) The Executive Vice President of Petitioner Greater South Suburban Board of Realtors ("GSSBR"), who was also the chief operating officer of GSSBR's Multiple Listing Service, testified that the real estate industry in Park Forest was "knowledgeable" about Apache Street and its "makeup," and perceived that Apache Street was "a black block" on which whites were "underrepresented." (*Id.*)

Discriminatory Real Estate Practices In The South Suburbs

The Petition asserts (p. 4) that the District Court "did not identify any illegal or invidious activity currently underlying the process of racial change in the South Suburbs." In fact, as noted above, the District Court specifically found that in the 1970s "brokers began to steer whites away" from Apache Street. (NAR App., p. 72.)

Moreover, the Court found that right up to the time of the trial, "black realtors . . . tend to push listings in black or integrated neighborhoods to their prospects who are also mostly black," and that "White realtors push listings in white neighborhoods to their white customers . . ." (NAR App., pp. 68-69.) Such practices amount to steering. Hundreds of audit reports and other information relating to the South Suburban and Southwest Suburban Areas have demonstrated continuing discrimination, including unequal treatment and steering by real estate agents in those areas. (Tr. 6850, 6874-78, 7103-04, Orfield; MX33 ¶A5-6.) In one lawsuit filed by the Housing Center, 15 realty firms acknowledged "there were detrimental real estate practices that were operating in the market," and that "blacks were being discouraged from looking in all-white areas" and "whites . . . from looking in integrated areas." (Tr. 289-90, Klepper.) Witnesses for all parties acknowledged that continuing discrimination by real estate agents helps perpetuate the segregated "dual housing market" in the Chicago area. (*See, e.g.*, Tr. 1112-28, K. Williams; Tr. 6874-78, Orfield; Tr. 7321-25, Matthews; PX88; Tr. 296-300, 7455-56, Klepper; Tr. 4120-23, F. Williams.)[9]

[9] Reporting the results of research conducted by HUD, the Secretary of HUD announced, "The evidence clearly shows that discrimination is pervasive in American housing markets." (PX59 at i.) The official planning agency for Northeastern Illinois has stated

(Footnote continued on following page)

Ruling Of The District Court

The District Court held that the Apache Street AMP did not violate the Fair Housing Act, and that the Realtors lack standing to pursue their Section 1983 equal protection claim.

Although the District Court did state, as the Realtors point out (Pet., p. 13), that the Apache Street AMP had a "racially disparate impact", the Court explained that what it meant was that "[t]he purpose of [the AMP] was to increase the likelihood that whites would view the Apache Street properties in numbers beyond what would be expected if [only] normal marketing techniques were used." (NAR App., p. 80.) The Court made clear that by disparate impact it did not mean *adverse* impact; to the contrary, the Court explicitly found that the AMP "does not have the effect of a greater adverse impact on one racial group than another." (NAR App., p. 99.) As noted above, the Court found that the AMP did not have the purpose or effect of restricting anyone's access to housing or information about housing, but rather "served to increase, not decrease, the existing supply of housing information." (NAR App., p. 98.)

Ruling Of The Court Of Appeals

The Court of Appeals affirmed the District Court's rulings with respect to the AMP. In addition to finding that the Apache Street AMP contains none of the infirmities of programs that restrict housing rights through quotas or otherwise, the Court stated:

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[9] *continued*
that past discrimination has "limited housing choices for many people in Northeastern Illinois" and that "[r]acial discrimination still occurs. . ." (PX60 at 13, 29.) The Realtors' General Counsel acknowledged that we still deal today with the persisting effects of past discrimination. (Tr. 2207-23, North.)

> "We disagree with the Realtors' argument that increased competition among black and white home buyers for the same homes constitutes a violation of the Fair Housing Act. Instead, this is precisely the type of robust multi-racial market activity which the Fair Housing Act intends to stimulate." (NAR App., p. 29.)

The Realtors filed a Petition for Rehearing with a suggestion for rehearing *in banc*. No judge in active service requested a vote on the Petition, and all of the judges on the original panel voted to deny it.

SUMMARY OF ARGUMENT

The Petition does not meet any criterion set forth in Supreme Court Rule 10 (Part I below). The Realtors ask this Court to decide the merits of their equal protection claim even though the lower courts did not reach that issue and no court in the country has ever decided the constitutionality of an affirmative marketing plan. Thus, not only is there no conflict among lower courts, but there is not even a lower court decision on the equal protection issue for this Court to review. Issuing a Writ of Certiorari in such circumstances would be highly unusual.

Additional grounds for denial of the writ include the Realtors' failure to meet two threshold requirements for their Section 1983 claim. First (Part II below), as the Court of Appeals and the District Court ruled, the Realtors lack standing to assert the fair housing rights of minority homeseekers. It is difficult to imagine a contrary ruling in light of the evidence of past and continuing discriminatory practices by real estate brokers contributing to segregation in the South Suburbs and the District Court's twin findings that (1) real estate brokers engaged in steering on Apache Street, and (2) current real estate broker practices preserve segregated living patterns. (NAR App., pp. 68-69.)

Second (Part III below), there is no cognizable Section 1983 claim because the Housing Center did not act "under color of law" when it developed and implemented the Apache Street affirmative marketing plan.[10] The evidence is that the Housing Center initiated the proposal to conduct affirmative marketing on Apache Street, developed the AMP, and was jointly responsible with Realtor Motluck for the AMP's implementation and funding. Park Forest's peripheral involvement—approval of the Housing Center's proposal—does not under the cases make the Housing Center's conduct "state action."

Finally, apart from these threshold issues, the Realtors' argument that the AMP infringes equal protection rights of minority homeseekers is without merit (Part IV). Indeed, the Realtors' position, in essence, is the plainly indefensible one that homeseekers of one race have a constitutional right to prevent homeseekers of another race from receiving information about available housing. Unlike affirmative action quotas or preferences that the Court will scrutinize strictly, the AMP does not impose a burden; it does not reduce housing information to anyone or in any way diminish the housing opportunities of either black or white homeseekers. In fact, as the Court of Appeals found, the AMP sought to enhance equal opportunity by making it possible for members of both races to be aware of and thus able to compete for the Apache Street homes. Given its non-burdensome nature, the AMP should not be subjected to strict scrutiny (Part IV.A below).

Even if the AMP were strictly scrutinized, however, it would be upheld (Part IV.B below). The AMP was developed to serve the compelling interest of counteracting the effects of both past and continuing housing market discrimination, and was quite narrowly tailored: it was limited

[10] Having found that the Realtors lacked standing, neither the District Court nor the Court of Appeals reached this issue.

to three homes, terminated upon their sale, and had no adverse effect whatever on the rights of third parties. It thus meets all of this Court's strict scrutiny tests.

ARGUMENT

I. THE PETITION MEETS NONE OF THIS COURT'S RULE 10 CRITERIA.

The Petition does not meet any criterion of Supreme Court Rule 10. There is no conflict among lower courts, none of which has ever decided the issue the Realtors ask this Court to address: whether affirmative marketing complies with the Equal Protection Clause of the Fourteenth Amendment. The District Court and Court of Appeals did not reach the merits of the equal protection claim because they determined that the Realtors lack standing to press it. (NAR App., pp. 21, 104.) If this Court were now to examine the merits of that claim, it would, quite literally, be considering a matter of first impression. It would be highly unusual for this Court to examine the merits of an issue that has not been fully developed in the lower courts.

The issue the lower courts *did* decide in this case—the Realtors' standing to assert the rights of minority homeseekers—is a case-specific, fact-intensive issue; application of prudential standing considerations turns on the analysis of considerable record evidence, as discussed in the Court of Appeals opinion and Part II below.

II. THE REALTORS LACK STANDING TO ASSERT THE RIGHTS OF MINORITY HOMESEEKERS.

The Court of Appeals noted that the Section 1983 rights asserted in the Realtors' counterclaim "can only be classified as those of minority home buyers rather than those of the Realtors themselves." (NAR App., p. 18.) The Court then properly ruled that the Realtors do not fall within the exception to the prudential rule against third party

standing; each of the three factors set forth in *Caplin & Drysdale, Chtd. v. United States*, 491 U.S. 617 (1989), weighs against Realtor standing.

With respect to the first *Caplin* factor, "the relationship of the litigant to the person whose rights are being asserted" (491 U.S. at 623, n. 3), the Realtors clearly lack such a similarity of interest with black homeseekers as would make them an appropriate proponent of the latter's fair housing rights. The record abounds with evidence of real estate industry discrimination against minority homeseekers, both past and present. See Restatement of the Case, *supra*. The District Court specifically found that Realtors conduct themselves in a manner that preserves segregated housing patterns, and that real estate brokers had conducted illegal steering on Apache Street itself. (NAR App., pp. 68-69, 72.) Moreover, as the Court of Appeals recognized, the Realtors failed to identify a single black homeseeker whose equal protection rights were violated, and failed to demonstrate that black homeseekers' priorities were the same as the Realtors'. (NAR App., pp. 19-20.) The Realtor/black homeseeker relationship is thus a far cry from the attorney-client relationship in *Caplin* that justified third-party standing there.

As to the Realtors' contention (Pet., p. 29) that their interests and those of minority homeseekers are "deeply intertwined" because a broker implementing the Apache Street AMP would violate the NAR's Code of Ethics and the Fair Housing Act, (1) both courts below ruled (in rulings unchallenged here) that implementation of the Apache Street plan did *not* violate the Fair Housing Act (NAR App., pp. 29-30, 101), and (2) a hearing panel of the Illinois Association of Realtors, a branch of the NAR, ruled unanimously that Motluck's participation in the Apache Street AMP did *not* violate the Code of Ethics. (Tr. 495-96, Pearson; PX47.) *Village of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990), cited by the Realtors in this connection, does not address affirmative marketing.

With respect to the second *Caplin* factor, the ability of minority homeseekers to advance their own rights (491 U.S. at 623, n.3), the Realtors' unsupported assertions, that minority homeseekers are "practically precluded" from challenging the AMP because they may never learn that they have been the AMP's "victims" and because they may not be able to finance litigation (Pet., p. 29), fare no better.

As the Court of Appeals found (NAR App., pp. 20-21), the record provides no support for these speculations. First, the Realtors themselves—including the 25 black GSSBR members with predominantly black clienteles (Pet., p. 2)—were a ready source of information about the Apache Street plan for the many black homeseekers they encountered on a daily basis. Yet they were unable during years of litigation to "point to a single minority home buyer" who was or claimed to be harmed by the AMP. (NAR App., p. 19.)

Second, as to finances, the Realtors could have assisted any black homeseeker who wished to intervene in this suit. For all this record shows, as the Court of Appeals recognized (NAR App., p. 21), the absence of a minority counter plaintiff or intervenor may be attributable not to lack of information or financial resources but to a disinclination to attack affirmative marketing.

As to the final *Caplin* factor, "impact of the litigation on third party interests" (491 U.S. at 623, n. 3), the Court of Appeals correctly notes a lack of evidence that the Realtors' position is representative of that of minority homeseekers. (NAR App., pp. 20-21.)[11] Thus, the Realtors'

[11] The letter from an official of a local NAACP chapter which the Realtors cite in their Petition (p. 30) is a letter of public comment submitted to HUD concerning the Realtors' voluntary affirmative marketing agreement. The letter emphasizes that the author's concern is with "program[s] that impose burdens on blacks by limiting their free choice of housing" (DX437, Bates #N303240)—which is of course not the case with the Apache Street AMP.

actions would have an adverse effect on the interests of black homeseekers who wanted the AMP upheld "in order to promote developing and maintaining an integrated community in Park Forest." (NAR App., p. 21.) Moreover, because the AMP has no adverse effect on black homeseekers' access to housing, this case does not present the sort of compelling need to protect third party interests that was present in *Caplin*, where this Court found that the challenged forfeiture statute "may materially impair the ability of third persons . . . to exercise their constitutional rights." (491 U.S. at 623, n.3, citation omitted.)

III. THE HOUSING CENTER IS NOT A STATE ACTOR.

If the Housing Center is not a state actor, it is of course not subject to an equal protection claim under Section 1983. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The Realtors nowhere address this fundamental issue explicitly. The state action requirement "assure[s] that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (emphasis in original). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." (*Id.* at 1004-05.)

The Realtors quote a 1981 university report suggesting the Housing Center may be a state actor by virtue of a "close nexus" with Park Forest. (Pet., p. 3.) As *Blum* makes clear, however, the Realtors must show that Park Forest was responsible for the "*specific conduct* of which the plaintiff complains." 457 U.S. at 1004 (emphasis added). The report was written well over a year before Park Forest's sales of the Apache Street homes to the Hous-

ing Center and thus does not even address that "specific conduct."

As to "close nexus," the Center is a private, not-for-profit corporation founded in 1975 by the Cook County League of Women Voters. (Tr. 169-71, Klepper; PX 90.) Its funders include charitable foundations, individual members and donors, and federal, county and municipal governments, including a number of towns in addition to Park Forest. (Tr. 185-86, Klepper.) Its programs are carried out over a wide area that includes dozens of municipalities. (Tr. 171-72, Klepper.) There is no evidence that Park Forest exercised control over Housing Center activities. To the contrary, the District Court found:

> "The evidence presented at trial demonstrated that the [Housing Center] (and not the municipalities) has controlled and implemented most of the programs challenged." (NAR App., pp. 94-95.)

Nor did Park Forest play a role in Apache Street affirmative marketing that renders it responsible for that "specific conduct." As discussed in the Restatement of Facts, the evidence (including Bean's testimony) demonstrates that Park Forest did not request or require bidders on the Apache Street homes to propose affirmative marketing; that the idea for affirmative marketing on Apache Street originated with the Housing Center; that the Housing Center and Motluck, not Park Forest, developed the AMP; and that the Housing Center and Motluck were solely responsible for its implementation and funding.

The state action argument therefore stands or falls on the circumstance that Park Forest accepted the Housing Center's proposal to affirmatively market the Apache Street homes and that its Village Manager approved an AMP conceived, developed, funded and implemented solely by private parties. Park Forest's action was precisely the sort of "[m]ere approval of or acquiescence in the initi-

atives of a private party" that *Blum* states "is not sufficient to justify holding the state responsible . . . under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982).

IV. THE APACHE STREET AFFIRMATIVE MARKETING PLAN DID NOT VIOLATE HOMESEEKERS' EQUAL PROTECTION RIGHTS.[12]

A. Apache Street Affirmative Marketing Did Not Impose A Burden On The Basis Of Race And Thus Is Not Subject To Strict Scrutiny.

Notwithstanding the Realtors' misleading rhetoric about "preference" and "manipulation", the AMP is nothing more than a means of providing *additional information* to homeseekers over and above the information provided in normal marketing. The Realtors do not challenge here the findings of the District Court, left undisturbed by the Court of Appeals, that special outreach to white homeseekers was to be carried out *in addition* to Motluck's normal marketing efforts, that Motluck was to use his best efforts to attract both minority and white homeseekers, and that the AMP had neither the intent nor the effect of restricting any group's information about, or access to, the Apache Street homes. (NAR App., pp. 73, 75, 95, 98, 101.)

Without reference to these features that make this case fundamentally different from most equal protection cases that have come before this Court, the Realtors assert that "Governmental programs based solely on race are inherently suspect." (Pet., p. 27.) However, unlike segregation of school children, and unlike strict contract set-aside programs, race-based employee layoffs, or medical school ad-

[12] In this Part IV we assume for the sake of argument that the Realtors have standing and that the Housing Center is a state actor.

mission quotas that this Court has addressed, affirmative marketing neither imposes a burden on the basis of race nor restricts anyone's choices. Rather than restricting housing options, affirmative marketing attempts to ensure that those options are more widely available. Careful review of this Court's decisions in this area reveals that this difference is critical.

Well before *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court had little difficulty invalidating governmental classifications that imposed burdens based on race. See, *e.g.*, *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Indeed, the question in *Brown* was whether school segregation *burdened* black schoolchildren. When the Court concluded that it did, its decision that school segregation violated the Equal Protection Clause followed naturally.

Thus, it is unsurprising that when the Court has considered how strictly to review race-based classifications designed to remedy past discrimination against minorities, the burden such classifications imposed on whites has been a key analytical factor. Strict scrutiny of the contract set-aside programs in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and *Fullilove v. Klutznick*, 448 U.S. 448 (1980), of the lay-off provision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and of the medical school admissions criteria in *Regents of University of California v. Bakke*, 438 U.S. 265 (1978), may all be traced directly to the burdensome nature of the racial classifications involved in those cases: it was the loss of the opportunity to compete for a government contract, or a teaching job, or a position in medical school, that moved the Court in those cases to apply strict scrutiny. See, *e.g.*, *Bakke*, 438 U.S. at 299 (Justice Powell: "When [political judgments] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the *burden he is asked to bear* on that basis is precisely

tailored to serve a compelling governmental interest."); *Croson*, 488 U.S. at 493 (in subjecting set-aside program to strict scrutiny, plurality emphasized that "The Richmond Plan *denies certain citizens the opportunity to compete* for a fixed percentage of public contracts based solely upon their race").

Indeed, in *Bakke* Justice Powell distinguished two lower court decisions that had approved race-conscious busing programs—not based on a finding of prior discrimination—on the ground that in neither case was there a showing that the school board's pupil transportation plan "might threaten liberty or privacy interests," nor were white students "deprived of an equal opportunity for education"; that is, neither case involved the imposition of a significant burden. 438 U.S. at 300, n.39 (citation omitted).[13]

It is clear, moreover, that the enhancement of the ability of one group to take advantage of a particular right or benefit is not itself a "burden" on other groups that triggers strict scrutiny. In *Lau v. Nichols*, 414 U.S. 563 (1974), for example, the Court held that the San Francisco school system had violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and its attendant regulations by failing to provide remedial English instruction for students of oriental ancestry who spoke no English. Justifying this result as a matter of equal protection, Justice Powell in *Bakke* wrote:

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[13] This theme is sounded many times in Justice Powell's *Bakke* opinion as he speaks of "classifications that rearrange burdens and benefits on the basis of race," 438 U.S. at 294, n.34; of "allocating benefits and privileges on the basis of skin color and ethnic origin," *id.*; of "individuals . . . excluded from enjoyment of a state-provided benefit," *id.* at 305; of "a classification [that] denies an individual opportunities or benefits," *id.*; of a "classification that imposes disadvantages upon persons," *id.* at 310; and of a state's "distribution of benefits or imposition of burdens," *id.* at 320.

> "[T]he 'preference' approved did not result in the denial of the relevant benefit—'meaningful opportunity to participate in the educational program'—to anyone else." 438 U.S. at 304.

Justice Powell similarly explained the Court's conclusion in *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), that New York's redrawing of its reapportionment plan to enhance the electoral power of some nonwhite voters who had been victims of unlawful dilution under the prior plan did not violate the Equal Protection Clause.[14] He wrote in *Bakke* that *United Jewish Organizations* was properly to be viewed as a case in which the remedy for discrimination encompassed measures to improve a disadvantaged group's ability to participate "without excluding individuals belonging to any other group from enjoyment of the relevant opportunity—meaningful participation in the electoral process." 438 U.S. at 305.

The lesson of cases like *Lau* and *United Jewish Organizations* is that race-based measures having the effect of enabling different racial groups to compete on equal terms, rather than putting members of one race at an advantage over members of other races, are viewed quite differently from race-based barriers to advancement and race-based denials of opportunity. This distinction comports with the underlying goals of the Equal Protection Clause: "equal opportunity" would be an empty promise indeed if governmental entities were effectively forbidden to take steps to enable members of all races to take ad-

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[14] In *UJO*, two Justices joined Justice White's view that the race-conscious redistricting did not violate the Equal Protection Clause because "there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength" (430 U.S. at 165), and two other Justices (including Justice Powell himself) expressed the view that the redistricting was constitutional because it had neither "the purpose or the effect of discriminating against [the plaintiffs] on the basis of their race." *Id.* at 180.

vantage of the benefits and rights (such as education and voting) that government offers its citizens.

This conclusion is reinforced by a simple appeal to common sense. Race-conscious affirmative marketing may be analogized to a medical school program that does *not* consider race in admissions decisions but, in an attempt to encourage a diversity of applications, disseminates information about the school's non-discriminatory admissions policy to racial groups who, it is feared, might not otherwise know about the school's programs and policies, or feel welcome to apply. Any fair reading of the several opinions in *Bakke* compels the conclusion that such a program would not have been disapproved by any member of the Court. Nor can one believe that the Court would have struck down the school board's program in *Wygant* if all the board had done was ensure that groups historically unrepresented in the application process were informed of job openings and advised that they were welcome to apply.

These examples illustrate how far the Realtors' claims would reach: if affirmative marketing were held to trigger strict scrutiny, the validity of thousands of affirmative marketing plans at all levels of government would be thrown into doubt, as would be countless race-conscious information programs of all sorts, *e.g.*, those of public employers who, upon discovering that their normal information channels lead to overwhelmingly white applicant pools, take special steps to inform minority groups of the non-discriminatory availability of jobs. The Realtors offer no persuasive justification for such a Draconian holding.

In sum, affirmative marketing fits comfortably within the tradition exemplified by *Lau*, for—to paraphrase Justice Powell's explanation of *Lau* in *Bakke*—affirmative marketing does not result in denial of the relevant benefit, meaningful opportunity to participate in the competition for

available homes. Thus, because the Apache Street Plan did not impose a burden on the basis of race, strict scrutiny is inapplicable. It follows that the AMP passes equal protection muster, for affirmative marketing is obviously an appropriate method of fostering the important goals of combating discrimination in the housing market (see Section B below) and of "promoting stable, racially integrated housing." *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 111 (1979).

B. Apache Street Affirmative Marketing Served The Compelling Interest Of Avoiding "Passive Participation" In Discrimination And Was Narrowly Tailored To Promote That Interest.

Even if strict scrutiny were to be applied, the Apache Street Affirmative Marketing Plan would be upheld.

Recently, *Richmond v. Croson* made clear that a state actor has a compelling interest in ensuring that it lends no support to the discriminatory practices of someone else by "passive participation" in them. 488 U.S. at 492.[15] The Housing Center (assuming it to be a state actor) thus had a compelling interest in ensuring that in its disposition of the Apache Street homes it did not become a "passive participant" in the Chicago area's racially discriminatory dual housing market.

Affirmative marketing at Apache Street was an attempt to break out of that dual housing market. The record in this case abounds with evidence that the Chicago metropolitan housing market, including Apache Street and the

[15] Justice O'Connor's plurality opinion on this point was joined by Chief Justice Rehnquist and Justice White. Justice Marshall, joined by Justices Brennan and Blackmun, agreed that the interest described by the plurality was compelling. 488 U.S. at 536-37 (Marshall, J., dissenting). Thus, a majority of the Court accepted this principle.

South Suburbs generally, is instinct with housing discrimination. See Restatement of the Case, *supra*.[16] Moreover, the discrimination that the District Court found had occurred on Apache Street—the steering of whites away from that street—is precisely the type of discrimination that the AMP was designed to redress. In light of the evidence of the history, demographics and current home-seeking traffic on Apache Street and surrounding areas, which was carefully studied before the AMP was developed (Tr. 223-27, 234-36, 322, Klepper), the Housing Center had ample reason to believe that, without affirmative marketing, its disposition of the Apache Street homes would indeed render it a passive participant in a discriminatory housing market.

The Apache Street Plan was also narrowly tailored to achieve this goal. The Realtors argue that a race-conscious measure should "avoid[ ] unnecessary harm to innocent third parties" and should "not rely on an absolute racial preference." (Pet., p. 28.) It would be difficult to imagine a program that satisfied those criteria better than the Apache Street AMP. Because, as we have discussed, Apache Street affirmative marketing did not restrict anyone's housing choices in any way, it had *no* adverse impact on the rights of third parties. Nor did it create an "absolute racial preference"—or even a limited one—as is sometimes the case with affirmative action programs (*see, e.g., Wygant*, 476 U.S. at 282-83 (plurality opinion)), for *sales* decisions at Apache Street were made without regard to race.

Another important consideration is whether race-neutral measures could have been equally effective. See *Croson*,

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[16] Because the market in which homeowners and homeseekers in Park Forest operate is larger than Park Forest itself, it is not appropriate to isolate Apache Street or Park Forest from the rest of the local housing market. *See Hills v. Gautreaux*, 425 U.S. 284, 299-300 (1976) (discussing the "Chicago Housing Market Area").

488 U.S. at 507. Where the problem to be corrected is the channeling of blacks and whites into two separate housing markets, race-neutral measures would not be efficacious. The dual housing market means that blacks do not hear about housing opportunities in white neighborhoods, and whites do not hear about them in black or integrated neighborhoods; the obvious (and most unobtrusive) solution is to take steps to ensure that blacks and whites *do* hear about such opportunities.

Finally, with respect to whether the Apache Street AMP was sufficiently "temporary" (Pet., p. 28), it would again be difficult to imagine a more acceptable program. The AMP was extremely limited—applying to only three homes—and expired upon sale of the homes.

Because the Apache Street Plan was thus designed to promote a compelling governmental interest and was narrowly drawn to promote that interest, it met the requirements of strict scrutiny.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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January 6, 1992

APPENDIX

AFFIRMATIVE MARKETING PLAN[1]

Appendix made a part of agreement
dated June 13, 1983 between
South Suburban Housing Center (SSHC) and
Century 21, Host Realty, Ltd. (Realtor)

Purpose: The purpose of this plan is to assure that all clients of the Realtor are informed: (1) of available dwellings in locations throughout the south suburban housing market area of the Chicago SMSA; and (2) of available dwellings in neighborhoods to which persons of the client's race are not likely to be attracted without special outreach efforts.

1. Realtor shall use its best efforts to attract minority and majority groups persons to the dwelling at 26 Apache Street (the "Apache St. home").

2. SSHC and Realtor have considered the racial composition of the Chicago SMSA, the Village of Park Forest, the Eastgate subdivision in Park Forest and other demographic information, and agree that white homeseekers are not likely without special outreach efforts to be attracted to the Apache St. home.

---

[1] PX17. An "Exclusive Agreement to Sell" was entered into between the Housing Center and Motluck for each of the three Apache Street homes, and to each an Affirmative Marketing Plan was attached as an appendix. PX15-17. The PX17 Agreement begins, "In consideration of your agreement to use your best efforts to find a purchaser for the real property described above and to implement the affirmative marketing plan attached as appendix I hereby grant to you for the term of 4 months from date hereof the exclusive right to sell the property . . ." The Agreement and the Plan for each of the three homes were substantially similar.

3. SSHC and Realtor shall agree upon the particulars of, and Realtor shall carry on, the following special outreach activities to attract white homeseekers to the Apache St. home:

A. Placement of advertisements in newspapers with a predominantly white circulation;

B. Distribution of information to selected rental developments; and

C. Distribution of information to selected employers.

Agreement upon such particulars is a condition to SSHC's commission obligation.

4. Realtor shall take the following steps in the following order with respect to all clients who enter its office for assistance:

A. Encourage each client to consider available dwellings in locations throughout the south suburban area, and inform each client that it (i) has information about available dwellings in such locations; (ii) will make such information available to the client; and (iii) will show any available dwelling the client chooses to see.

B. Inform each client of counseling available through the Homeseeker's Service of SSHC, and give each client a current SSHC brochure.

C. In the course of providing information about specific available dwellings, assure that each client is informed about available dwellings in neighborhoods in which persons of the client's race are not likely to be attracted without special outreach efforts.

Realtor shall not take any action which prohibits, restricts, narrows or limits the housing choice of any client on the basis of race.

5. Realtor shall maintain, and upon SSHC's request shall provide SSHC with, the following information:

A. An up-to-date traffic register for the Apache St. home, including: a list of all persons, by race, who

inquire of the Realtor as to the availability of the Apache St. home, whether or not through a non-listing broker, the source of each such inquirer's information about the Apache St. home; a list of all persons, by race, who are shown the Apache St. home, whether or not by a non-listing broker; and a list of all persons, by race, who apply to purchase such homes.

B. An up-to-date Equal Service Report form (Prospect Card), a copy of which is attached hereto as Exhibit A, for each client to whom Realtor provides a listing of any homes, wherever located. Realtor shall note on such form whether the client was informed about the Apache St. home.

C. A description of the special outreach efforts carried out pursuant to paragraph 3.

6. On or about April 15, 1983 Realtor shall make all of its staff persons engaged in the sale or rental of dwellings available for not less than nine hours at times and places to be agreed upon with SSHC, and SSHC shall provide training in affirmative marketing to such persons.

7. SSHC will require all nonlisting brokers and their agents who show the Apache Street homes to provide the information called for by paragraph 5A.

8. Realtor and SSHC shall evaluate the implementation of this affirmative marketing plan on a semi-monthly basis, or more often if mutually agreed. The plan may be modified from time to time, if mutually agreed, based on such evaluations.

Approved: Village of Park Forest

By: /s/ John Perry

South Suburban Housing Center

By: /s/ Christine C. Klepper by John R. Petruszak

Century 21, Host Realty, Ltd.

By: /s/ [Illegible Signature]

Supreme Court, U.S.
FILED
JAN 6 1992
OFFICE OF THE CLERK

No. 91-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation, and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF MUNICIPALITIES IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Does a municipal ordinance that provides residents with the option to avoid unwanted real estate solicitations in the privacy of their own homes comport with the First Amendment and the Equal Protection Clause?

II. Does a municipality that notifies all real estate agents doing business in the community of the scope of enforcement under an unambiguous solicitation ordinance provide fair notice of prohibited conduct?

III. Does a municipal ordinance that permits the placement of real estate signage (and other signage) in residential areas, but regulates the size, number, and location of all such signage to promote community aesthetics, satisfy the First Amendment?

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF MUNICIPALITIES IN OPPOSITION

STATEMENT OF THE CASE

Introduction

The Realtors hang their Petition as to the Municipalities on what they call a "single question: whether a municipality may attempt to manipulate its real estate market to preserve its character as an integrated but predominantly white community." Petition at 18.

While the "question" may be interesting, it is fanciful in this case. "Manipulation" of the real estate market is not what the challenged ordinances did or sought to do. Although the Realtors have alleged "manipulation" since the first days of the suit, two courts have unanimously concluded that they never backed it up with proof. Nor are the Municipalities, which are proud to be racially integrated, "predominantly white"; indeed, several are "predominantly black" and have been for a number of years,[1] but their commitment is no less than that of the others to the protection of residential privacy and the fostering of residential diversity.

Although the Realtors have chosen to spice their Petition with a racial attack on Municipal motives, the record is replete with evidence of the Municipalities' long and abiding commitment to fair housing for all racial groups. The Municipalities were among the earliest communities anywhere to be open to residential integration. Several

[1] According to the 1990 summary population data by race published by the U.S. Census Bureau, four of the nine Municipalities are majority-black: Country Club Hills (57%), Calumet Park (72%), Hazel Crest (51%), and University Park (79%); the remaining communities have substantial black populations: Matteson (44%), Park Forest (25%), Glenwood (25%), Richton Park (22%), and Blue Island (14%).

of the Municipalities enacted ordinances more than twenty years ago creating human relations commissions and prohibiting a variety of discriminatory housing practices, such as steering, panic peddling, and racially motivated refusals to deal. *See, e.g.*, Jt.App. 873; Tr. 120, Bean; Tr. 5481-82, Dubruiel.[2]

More recently, several Municipalities have received certification from the United States Department of Housing and Urban Development ("HUD") that their fair housing ordinances were, as enacted and administered, "substantially equivalent" to the federal Fair Housing Act. Jt.App. 682, 690, 891; 42 U.S.C. § 3610(f). During HUD's review process, the Realtors filed formal charges with HUD, mirroring the allegations of this litigation and claiming that the fair housing programs of these communities manipulated the racial composition and deterred black entry. 53 Fed. Reg. 26,318 (1988); 49 Fed. Reg. 32,049 (1984). HUD exhaustively investigated these charges, then categorically rejected them, finding that the Municipalities had administered their fair housing programs and ordinances in a manner wholly consistent with equal housing opportunity and the promotion of residential racial integration. *Id.*

The interest of real estate agents in the South Suburbs is in "making sales," not "promoting integration," as the district court concluded after weighing the evidence below.

---

[2] References to "NAR.App." and "M.App." are to the Appendices filed before this Court by the Realtors and the Municipalities, respectively. Citations to the record below are designated "Jt. App." (for the Joint Appendix filed in the court of appeals) or, if applicable, the record ("R.____") or trial transcript and testifying witness ("Tr. ____").

NAR.App. 69, 713 F. Supp. at 1075. Unfortunately, they have not confined their interest merely to making sales. As the district court found, white Realtors "push listings" in white neighborhoods to white customers, while black Realtors "push listings" in black or integrated neighborhoods to their black customers—a form of racial steering that exacerbates the threat of resegregation facing the communities in which Realtors operate. NAR.App. 68-69, 713 F. Supp. at 1074-75. In the face of such deeply ingrained Realtor practices, not to mention expensive legal challenges financed by their national trade association, it is remarkable that the Municipalities have managed to maintain their commitment to residential racial diversity. They have done so unwaveringly.

In proceedings below, the Realtors straightforwardly based their Municipal racial attacks on purported violations of the Fair Housing Act, which, of course, they were obliged to prove. After they failed, and their claims were rejected and thoroughly discredited by both the district court and the court of appeals, the Realtors dropped the Fair Housing Act claims from the Petition before this Court. Thus, they now are bound by the lower courts' final rejection of their race-based claims. Yet, the Realtors want to have it both ways: to preserve the racial rhetoric without challenging the lower courts' repudiation of its basis. (They obviously have calculated that without the racial rhetoric, they are unlikely to interest this Court in taking their appeal.) Thus, the Petition retains the pervasive racial innuendo that previously propped up the rejected Fair Housing Act claims, but carefully conceals from view the categorical findings of the two lower courts that the Realtors utterly failed to put proof behind their rhetoric.

Because the Realtors have retained the rhetoric, it is instructive to review how decisively the lower courts, after reviewing the evidence, repudiated it. In the case of the solicitation ordinances, for example, the court of appeals found that "the Realtors have pointed to nothing in the record that would even remotely demonstrate that the purpose of these facially neutral limitations on solicitation was to cause blacks to suffer racial discrimination." NAR.App. 35, 935 F.2d at 887. As to the possible racial effects, the court of appeals agreed with the district court that there was " 'no substantial evidence tending to show that the solicitation ordinances have had a racially discriminatory effect,' " particularly since " 'the only families barred from receiving solicitations are precisely those who are least likely to offer their homes for sale anyway . . . .' " NAR.App. 36, 935 F.2d at 887 (*quoting* 713 F. Supp. at 1094-95). The court of appeals concluded that the "minimal effect the solicitation restrictions impose upon real estate activity causes no discernable discriminatory effect on the potential home buying public, even if it is predominantly black." NAR.App. 37, 935 F.2d at 888.

As for sign regulations, each of the lower courts found no factual support for the Realtors' argument that the aesthetic purpose of the size and placement restrictions was pretextual. The unanimous panel of the Seventh Circuit noted that there was "nothing in the record that leads us to conclude that these aesthetic interests, declared in either the preamble or the text of the ordinances involved, were not the genuine purpose of each ordinance." NAR.App. 54, 935 F.2d at 897.

Finally, the lower courts' rejection was equally emphatic of the Realtors' race-based challenge to the South Suburban Housing Center's ("SSHC's") Apache Street affirmative marketing plan (issues thoroughly addressed in SSHC's Brief in Opposition, which the Municipalities adopt and

incorporate by reference). As SSHC ably demonstrates, moreover, two dispositive threshold issues bar reaching the merits of the Realtors' equal protection claim: their lack of third-party standing to litigate the rights of minority homeseekers, and the fact that the Plan was proposed, drafted, implemented, and funded by SSHC, thereby implicating no state action.

The Municipal Solicitation Ordinances

It is not surprising that the lower courts found the solicitation ordinances unobjectionable (racially or otherwise). They are not "anti-solicitation"; they merely let each resident decide whether to receive real estate solicitations in the privacy of his or her own home, and insist that the Realtors respect that decision.

For many years, real estate brokers have used a variety of high-pressure tactics to obtain home listings from residents of the Municipalities. They have conducted door-to-door campaigns near recently sold homes, launched mass telephone "surveys" of residents inquiring about their plans to move, and sent repeated mailings of various subtle or not-so-subtle solicitation materials to the same residents, through a technique called "farming." *See, e.g.*, Jt.App. 388-91, 541-44; R.365-1; Tr. 3918-19, 3929, Benkendorf. Indeed, the President of GSSBR testified during trial that the homes in his market area could receive fifty or more contacts in a single year from real estate agents in hot pursuit of listings. Jt.App. 390-91.

Unrelenting and unwanted real estate solicitations in the homes of Municipal residents are more than an annoyance. They intrude on privacy and, for many, do more than that. Many residents, both black and white, previously lived in Chicago neighborhoods which experienced the

devastating social and economic consequences of racial resegregation following massive real estate sales campaigns. *See, e.g.*, Jt.App. 554-60, 563-64; Tr. 5468-69, Dubruiel. Having moved to the Municipalities for the express purpose of living in integrated communities, they are understandably sensitive to real estate solicitation techniques that serve as threatening and intrusive reminders of the process of resegregation that overtook their former communities. *See, e.g.*, Jt.App. 513-14, 630-65; R.348-2; Tr. 6485-87, Martin. For that reason, the district court, in upholding the solicitation ordinances, expressly found that extensive real estate solicitation "is widely perceived to be destabilizing to an integrated community." NAR.App. 114, 713 F. Supp. at 1094. Thus, the Realtors' solicitation practices in the Municipalities, more than any other form of commercial solicitations, have provoked repeated complaints, from residents to Municipal officials. *See, e.g.*, Jt.App. 453, 481-82; Tr. 6285, Roberts; Tr. 6395, 6495-97, 6705-06, Martin.

Whether the resident's concern is privacy in the home, or a desire to be shielded from excessive real estate solicitations, the ordinances provide an option that can be activated only by the affirmative act of the individual homeowner, who, to be covered by the ordinance, must indicate in writing (orally revocable at any time) that he or she does not want to move and does not wish to be solicited by real estate agents. NAR.App. 142-48. The ordinances prohibit solicitation, but only to these specifically self-selected residents, which in each Municipality amount to a quarter or less of the households. *See, e.g.*, Jt.App. 514 (Matteson, 25%); MX199 (Glenwood, 23%); Jt.App. 568 (Hazel Crest, 20%); Tr. 6632, Martin; MX24 (Country Club Hills, 2.7%); Tr. 5153, Perry (Park Forest, 0.2%). Even as to those households, the prohibition is limited to in-

home solicitations, and there is an exemption for solicitations by media of general circulation. *See* NAR.App. 144-45, 147-48; M.App. 1.

Each ordinance requires the Municipality to compile a list of residents signing nonsolicitation cards, to maintain and post it at the Municipal Clerk's office, and to distribute the updated list at least annually to all real estate agents doing business in the area.[3] NAR.App. 142-44, 146-48. No administrative or enforcement action occurs unless and until there has been a complaint to the Municipality by an offended resident on the nonsolicitation list. *Id.*; Tr. 5274-75, Cardona; Tr. 3012, McGinness; Tr. 5478-79, Dubruiel. Finally, to eliminate any uncertainty (real or contrived) as to the scope of covered solicitations, the Municipalities have published an enforcement policy stating that, with respect to homeowners on the nonsolicitation list, "*any* business or promotional communication by a real estate broker to a homeowner in his or her home which is not carried out by media of general circulation" is covered.[4] NAR.App. 13-14, 935 F.2d at 876 (emphasis

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[3] The Realtors' suggestion that the solicitation ordinances target only GSSBR members, *see* Petition at 6, is plainly untrue. The ordinances apply to "any real estate agent, broker or salesperson" doing business in the Municipality, without regard to trade association membership, and all enforcement procedures make no distinction between GSSBR members and non-members. *See, e.g.*, R.App. 141.

[4] The fact that all Realtor business or promotional communication to homeowners are solicitations (i.e., intended to induce business, sooner or later) has not been seriously contested by the Realtors in the Petition. As they concede, "[b]rokers attract referrals and listings by distributing an eclectic variety of written materials. These materials may include certificates for a free evaluation of a home's market value, information about the broker's credentials,

(Footnote continued on following page)

added); M.App. 38 (enforcement policy from Country Club Hills attached for reference).

Protection of residential privacy was and is fundamental to the solicitation ordinances. Contrary to the Realtors' false assertions, Petition at 7, 22, the legislative history even of the original solicitation ordinances shows that one of their purposes, as the district court found, was to "provide a method for a resident to obtain a measure of privacy by avoiding annoying and intrusive inquiries about residential plans." NAR.App. 115, 713 F. Supp. at 1094. In originally passing the solicitation ordinances, the Municipalities relied on a legislative commentary that made explicit reference to *Rowan v. Post Office Department*, 397 U.S. 728 (1970), this Court's decision upholding the protection of residential privacy from commercial intrusion. *See, e.g.*, Jt.App. 781, 795. Later, one Municipality made explicit findings regarding privacy as a foundational element of its solicitation ordinance:

> [T]hat real estate solicitations, conducted by mail, direct delivery, telephone or in person and directed at residents who do not desire to sell, rent or list their dwellings for sale or rental, invade[ ] the privacy of these residents and create[ ] unwanted pressure to move from their dwellings.

Jt.App. 776.[5]

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[4] *continued*
holiday greeting cards and calendars, announcements of promotional contests, and catalogues of homes available for sale. Brokers also may use telephone calls to identify residents who are interested in their services." Petition at 19.

[5] In any event, a municipality may assert in defense of the validity of its ordinances an interest other than that which prompted their original enactment. *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983) ("insufficiency of the original motivation does not diminish other interests that the restriction may now serve").

The privacy protections of the solicitation ordinances have been invoked by a broad cross-section of Municipal families—both "black and white, newcomers and oldcomers." NAR.App. 116, 713 F. Supp. at 1094. Moreover, contrary to the Realtors' suggestion that the Municipalities "repeatedly solicit[ed]" residents to participate, *see* Petition at 7, the district court found that the most active three of the nine Municipalities had done nothing more than "actively publicize" the existence of these ordinances, NAR. App. 115, 713 F. Supp. at 1094, which was appropriate because many residents in those communities were unaware of the existence of the ordinances. *See* Jt.App. 452-54, 481-82, 579. The three Municipalities did nothing more than send a mailing of returnable nonsolicitation requests to all residents, with an explanation of how the ordinance worked. *See, e.g.*, Jt.App. 1184, 1195, 1198. There was absolutely no evidence that any Municipality pressured, frightened, tricked, or intimidated its residents into signing nonsolicitation requests. Indeed, in the Municipality with the highest percentage of households on the nonsolicitation list, Realtors are still free to solicit more than 75% of the households in that community. Jt.App. 514.

Thus, the solicitation ordinances are carefully drawn and limited to protect the right of privacy in the homes of those residents who have affirmatively invoked that right, while preserving the ability of Realtors to ply their trade among all but a self-selected, uniquely unpromising class of potential customers. As noted by both lower courts, the only people blocked from the Realtors' commercial pleading are those who have specifically said they do not want to hear it.

Nor have the ordinances impeded Realtors in their efforts to solicit residents not on the list. As the appellate court concluded, the names on the nonsolicitation lists can

easily be deleted from the Realtors' mailing lists. NAR. App. 36 n.16, 935 F.2d at 888 n.16. Similarly, there is no credible evidence in the record that Realtors are unable to use cooperative or bulk mailing companies because of the ordinances. *See* Petition at 7.[6]

The Municipal Sign Ordinances

Throughout their Petition the Realtors characterize the various sign ordinances as if the Municipalities regulate only real estate "for sale" signs.[7] In fact, as both the district and appellate courts found, the four real estate sign regulations at issue here are all components of broader, comprehensive sign regulatory systems, grounded in aesthetic concerns, contained within the zoning or building codes of those Municipalities, and imposing comparable limitations on other varieties of signage. *See, e.g.*, NAR. App. 14-15, 53-55, 935 F.2d at 877, 896-97; NAR.App. 110-11, 713 F. Supp. at 1092-93.

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[6] Although there was evidence at trial that one bulk mailing company was unwilling to delete nonsolicitation addresses from such mailings, the impact of this lone decision on Realtor marketing efforts was inconsequential. There was no evidence that this company's policy was standard in the industry, or that an adequate sorting process was technologically or commercially infeasible, or that this policy would not have been modified for a reasonable fee. In any event, there was testimony from Realtors themselves that such mass mailings are less effective than personalized mailings, which can be sorted quite easily to avoid nonsolicitation households. *See, e.g.*, Jt.App. 416-18; Tr. 3964, 3972-73, Zaczek.

[7] The Realtors incorrectly refer to these as "real estate sign" ordinances, when they are in fact omnibus sign ordinances. They also seek to muddy the waters by referring to prior, repealed sign bans of Glenwood and University Park, which are not at issue here. *See* Petition at 9.

These sign ordinances restrict the size, placement, number, and illumination of a variety of signage in residential areas, including real estate "for sale" and other commercial and political signs, for the purpose of preserving and enhancing the visual beauty of these suburban communities. *See, e.g.*, M.App. 1-37. This purpose is reflected in the preambles of all of the ordinances. For example, the prefatory section of Matteson's zoning code regarding signs provides that

> [t]his section is established to create the standards for a comprehensive and balanced system of signs for the Village to achieve the following purposes:
>
> . . . .
>
> (4) *Aesthetic Appreciation.* To protect the physical and mental well being of the general public by encouraging a sense of aesthetic appreciation for the Village's visual environment.

M.App. 2; *see also* M.App. 24-25 (Park Forest, § 31-145(a)), 34 (Country Club Hills), 36-37 (University Park).

The Municipal sign ordinances do not regulate real estate signs in a manner materially different from other varieties of signage. For example, University Park regulates "for sale" signs similarly to political signs, and permits them both to be of any size so long as they are placed in the window of a home. M.App. 37. Country Club Hills imposes the same size requirements on real estate signs as it does on garage sale signs. M.App. 34, 36. Matteson permits real estate signs to be larger than religious and historic symbols, warning signs, directional signs, and business nameplates. M.App. 3-4. Park Forest exempts real estate signs from the location and illumination requirements applicable to other varieties of residential signs. M.App. 26-27, 30. These latter three Municipalities

allow "for sale" signs ranging in size from three to eight square feet. M.App. 4, 27, 34.

The district court found that "for sale" signs, as regulated by the Municipalities, remain a cost-effective form of advertising. The court noted that there was "little evidence that the sign regulations resulted in measurable lost income for realtors," and further that the regulations "leave open ample alternative channels for communication of [real estate] information." NAR.App. 106, 111, 713 F. Supp. at 1090, 1093. Indeed, after reviewing the full record the court of appeals concluded that the sign ordinances "further the localities' interest in aesthetics while permitting a 'for sale' sign to inform interested persons of the availability of a home." NAR.App. 55, 935 F.2d at 897.

The District Court's Decision

In the district court, the Realtors launched an across-the-board attack on virtually every Municipal ordinance touching upon the real estate business. They challenged the solicitation ordinances, the sign ordinances, and other Municipal programs and ordinances under the Fair Housing Act, 42 U.S.C. § 1982, 42 U.S.C. § 1983, and a variety of constitutional claims, all pursuant to one pervasive theme: that the Municipalities manipulated the real estate market with the invidious intent to exclude black homeseekers and maintain the racial status quo.

After patiently hearing eight weeks of testimony and sifting through a mountain of evidence, proposed findings of fact and conclusions of law, and trial briefs, the district court rejected all of the Realtors' race-based Fair Housing Act claims (including those directed against the solici-

tation ordinances and the sign regulations). He found that the Realtors had failed to make "any credible showing" that the sign ordinances made housing unavailable or were enacted or administered discriminatorily, NAR.App. 107, 713 F. Supp. at 1091, and he found the record "devoid of substantial evidence" tending to show that the solicitation ordinances were racially discriminatory in intent or effect, NAR.App. 115, 713 F. Supp. at 1094.

The court went on to hold the solicitation ordinances constitutional under the First Amendment and Due Process Clause to the extent that they prohibit real estate solicitations "actually seeking to induce the sale, rental or listing of dwellings." NAR.App. 131, 713 F. Supp. at 1101. The court also upheld the sign ordinances in their entirety, finding them to be racially neutral, "modest and reasonable" regulations that promote community aesthetics without impeding the flow of real estate information. NAR.App. 106-11, 713 F. Supp. at 1090-93.

The Court of Appeals' Decision

On appeal to the Seventh Circuit, the Realtors abandoned many of their claims, but continued to challenge the Municipal solicitation ordinances under the Fair Housing Act, the First Amendment, the Due Process Clause, and the Equal Protection Clause, and the sign regulations under the First Amendment.

The court of appeals upheld the validity of the solicitation ordinances in their entirety against all challenges, holding that the Realtors had "pointed to nothing in the record that would *even remotely* demonstrate that the purpose of these facially neutral limitations on solicitation was to cause blacks to suffer racial discrimination." NAR.

App. 35, 935 F.2d at 887 (emphasis added). As to effects, the court said:

> [W]e believe it is significant that "the only families barred from receiving solicitations are precisely those who are least likely to offer their homes for sale anyway . . . ." Consequently, any effect upon the sale of homes will be minimal because the only persons who cannot be contacted under the ordinances are those who have requested that their privacy not be disturbed and thus are not interested in receiving real estate solicitations. In our opinion, the minimal effect the solicitation restrictions impose upon real estate activity causes no discernable discriminatory effect on the potential home buying public, even if it is predominantly black.

NAR.App. 36-37, 935 F.2d at 888 (*quoting* 713 F. Supp. at 1094).

With respect to the Realtors' First Amendment challenge to the solicitation ordinances, the court, in a straightforward application of *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), and *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469 (1989), and drawing extensively from this Court's decisions in *Rowan v. Post Office Department*, 397 U.S. 728 (1970), and *Frisby v. Schultz*, 487 U.S. 474 (1988), held that the ordinances' restrictions on Realtors' commercial speech directly advanced the Municipalities' substantial governmental interest in protecting residential privacy, and did so in a manner no more extensive than necessary. NAR.App. 37-49, 935 F.2d at 888-94. The court also disposed of the Realtors' equal protection claim, holding that these "narrowly drafted" ordinances achieved a reasonable fit between the goal of protecting residential privacy and the means chosen to effectuate it. NAR.App. 52-53, 935

F.2d at 895-96. Finally, the court dispatched the Realtors' vagueness challenge, noting that the "clear and unambiguous" terms of the ordinances inform the Realtors precisely of what conduct falls within their scope: all business communications to the homes of residents on the nonsolicitation list. NAR.App. 50-52, 988 F.2d at 894-95.

The court of appeals also upheld the Municipal sign regulations against the Realtors' First Amendment challenge. Once again applying the *Central Hudson* analysis, the court held that the ordinances directly advanced their stated and actual purpose of promoting the quality of residential aesthetic appearance in a manner reasonably related to effectuating that purpose, without imposing a burden on Realtors or the homeseeking public. NAR.App. 54-55, 935 F.2d at 896-97.

On July 3, 1991, the Realtors filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. On September 5, 1991, the Court of Appeals denied the Petition, noting that all judges on the unanimous panel had voted to deny a rehearing and that no circuit judge had requested a vote on the Realtors' application for an *en banc* rehearing. NAR.App. 62-63.

REASONS FOR DENYING THE WRIT

As shown above, the racially charged accusations of the Realtors have been wholly discredited and have no application to this case. There was no "manipulation" of the real estate market; there was no intent to deny housing opportunities to or otherwise discriminate against blacks; there were no such effects or results. The important public and racially neutral purposes of protecting residential privacy and community aesthetics, far from being pretextual, were in fact the actual and legitimate purposes of the solicitation and sign regulation ordinances, neither of which materially impinged upon the Realtors' ability to communicate with interested homebuyers and homesellers.

The decisions of the courts below involved straightforward applications of well-established (and recently reaffirmed) First Amendment, Due Process, and Equal Protection principles. The decisions broke no new legal ground, are consistent with governing precedent, and present no conflicts with the decisions of this Court or any other federal appellate court. Nothing in this case, therefore, warrants this Court's further consideration.

I.

THE SOLICITATION ORDINANCES ARE CONSTITUTIONALLY VALID REGULATIONS OF UNWANTED COMMERCIAL SPEECH.

A. *Central Hudson* Supplies the Appropriate Standard of Scrutiny for Municipal Solicitation Ordinances.

The Realtors acknowledge that solicitations of residents on the nonsolicitation list "do[ ] indeed concern a proposed commercial transaction," Petition at 19-20, and therefore

constitute commercial speech. *See, e.g., Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473 (1989). Nevertheless, they attempt to elevate their solicitations to a level of importance that surpasses even core, political speech and argue for a standard of scrutiny more stringent than that required in *Central Hudson*. *See* Petition at 19-20. This plea is a predicate to the Realtors' argument that the court of appeals should have accorded no deference to the Municipalities' judgment regarding the appropriate "fit" between the ordinances' means and ends, notwithstanding the long line of decisions by this Court that such deference is appropriate in commercial speech cases. *Id.*; *see* NAR.App. 45-46, 935 F.2d at 892; *see, e.g., Fox*, 492 U.S. at 478-81; *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 343-44 (1986); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 508-10 (1981).

The Realtors' argument that an elevated status should be accorded to their solicitations predictably finds no support in this Court's jurisprudence. Indeed, the premise of this argument—that real estate solicitations have heightened importance to Municipal residents—is flatly contradicted by the record in this case. As the court of appeals and district court recognized, real estate solicitations have *no* value (and, in fact, are annoying, intrusive, and upsetting) to homeowners who have affirmatively requested that such solicitations be excluded from their homes. NAR. App. 36, 935 F.2d at 888.

Furthermore, contrary to the Realtors' assertions, the deference to legislative judgments required by *Central Hudson*, *Metromedia*, *Posadas*, and *Fox* is not eliminated when the speech "concerns lawful activity and is not misleading." Petition at 20-21. That, of course, is *Central Hudson*'s *threshold* requirement before commercial speech is accorded *any* First Amendment protection. *See* 447 U.S.

at 564. The Realtors apparently would have this Court exempt unwanted real estate solicitations from standard judicial scrutiny while at the same time subjecting commercial speech that is valued by its recipients to the requirements of the *Central Hudson* test.

Finally, the Realtors' repeated references to the "content-based" nature of the solicitation restrictions are, purely and simply, red herrings. Governments are accorded reasonable flexibility in enacting content-based regulations of commercial speech. *See, e.g.*, NAR.App. 38, 935 F.2d at 888-89 (citing cases); *see also Central Hudson*, 447 U.S. at 564 n.6 (discussing reasons why content-based restrictions on commercial speech are permitted). This Court repeatedly has emphasized the subordinate position of commercial speech, the limited nature of its First Amendment protection, and the fact that "modes of regulation that might be impermissible in the realm of noncommercial expression" are permissible with regard to commercial speech. *Fox*, 492 U.S. at 477. So long as the regulation of commercial speech satisfies *Central Hudson*, the fact that it is content-based is not significant. *See, e.g.*, *Posadas*, 478 U.S. at 342-44 (upholding ban on local advertising of casino gambling but not on other lawful activities).[8]

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[8] The Realtors posit a supposed conflict between the Seventh Circuit's decision here and the Sixth Circuit's in *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464 (6th Cir. 1991), which they cite for the proposition that content-based restrictions on truthful commercial speech will be upheld only if they are narrowly drawn to accomplish a compelling state interest. Petition at 21. In *Discovery Network*, however, the court first analyzed the regulations at issue under the *Central Hudson* test and then, as an alternate holding, analyzed them under the familiar "content neutrality" tests applicable to *noncommercial* speech. *See* 946 F.2d at 472-73 (relying on *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2474 (1991) (White, J., dissenting), which addressed regulations of noncommercial speech).

B. The Solicitation Ordinances Directly Advance the Substantial Governmental Interest in Protecting Residential Privacy in a Manner No More Extensive Than Necessary to Serve That Interest.

Consistent with their attempt to exempt their unwanted commercial speech from the *Central Hudson* test, the Realtors pepper their Petition with irrelevant references to cases dealing with noncommercial speech or addressing outright bans of certain speech (not, as here and in *Rowan*, with governmental mechanisms regulating commercial speech only after particular residents affirmatively express their desire not to receive it). *See, e.g., Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (government ban of contraceptive advertising before potential recipient stated whether mailing was desired); *Carey v. Brown*, 447 U.S. 455 (1980) (noncommercial speech). As the court of appeals held, however, the Municipal solicitation ordinances are constitutionally valid regulations of commercial speech: they were enacted to further the substantial governmental interest in protecting residential privacy, they directly advance that privacy interest, and they are no more extensive than necessary to serve it. NAR.App. 37-49, 935 F.2d at 888-94.

The Realtors' repeated assertion that the protection of residential privacy was "pretextual" and not an actual Municipal purpose has been addressed above and will not be repeated here, except to note that the tone of the Realtors' argument betrays an acknowledgement that the privacy interest, unless contrived, is constitutionally sufficient. *See supra* pp. 8, 14. As both courts expressly found, privacy was an actual purpose of the ordinances, and the Realtors never have contested that the protection of residential privacy is indeed a "substantial" governmental interest. *See* NAR.App. 44, 935 F.2d at 891.

That the solicitation ordinances directly advance the privacy interests of the residents is equally clear. When particular residents expressly indicate that they do not want the privacy of their homes invaded by real estate solicitations, it is difficult to imagine an ordinance that more directly effectuates that interest than one which prohibits such solicitations in the homes of those persons (but only those persons).

The Realtors' assertion that the Court of Appeals "never said how" the solicitation ordinances directly advance the governmental interest in protecting residential privacy is simply wrong. The Realtors' Seventh Circuit argument on this point was that the ordinances do not directly advance privacy because they are "underinclusive" in regulating only real estate solicitations. *See* NAR.App. 44, 935 F.2d at 891-92. The court correctly concluded that an ordinance's alleged "underinclusiveness" is irrelevant to the question whether it "directly advances" the governmental goal. *Id.* Local governments are not and cannot be required to deal comprehensively with all conceivable aspects of a problem, but may select those particular aspects that they conclude, in the exercise of their considerable discretion, warrant present attention. *See, e.g., Posadas*, 478 U.S. at 342-44; *Metromedia*, 453 U.S. at 511.

Moreover, under this Court's decisions in *Central Hudson*, *Metromedia*, *Posadas*, and *Fox*, there is no requirement that the particular kind of commercial speech regulated be more intrusive or intrinsically more harmful than other forms of commercial speech. *See id.* If that were a requirement, every regulated form of commercial speech would have to be scrutinized against every unregulated form of speech, to make sure that the unregulated speech is not equally or more "intrusive" or "harmful" than the regulated speech. That would be a quagmire of compara-

tive analysis, entangling the courts in just the kind of minute second-guessing of governmental decisionmaking that *Central Hudson* eschews.

In any event, the evidence demonstrated overwhelmingly that real estate solicitations *are* inherently more intrusive than other commercial solicitations. The home's unparalleled symbolic and emotional importance as a private preserve, and its financial significance to the family—facts the Realtors themselves emphasize, *see* Petition at 20—coupled with the fact that, for many Municipal residents, real estate solicitations are unsettling reminders of past aggressive real estate activity that contributed to resegregation in their former communities, make the regulation of real estate solicitations into the home particularly appropriate. Solicitations for such things as "fast food and dry cleaning services," Petition at 21, simply do not implicate residential privacy to the same degree, or provoke the same magnitude of widespread complaints, as real estate solicitations.

Finally, the solicitation ordinances are no more extensive than necessary to achieve the goal of protecting residential privacy; there is a "reasonable fit" between the ordinances' means and ends. The ordinances impose negligible (if any) burdens on Realtors, while providing those residents who desire to shield themselves from unwanted real estate solicitations in their homes a means by which to do so. *See* NAR.App. 45-49, 935 F.2d at 892-94.

C. The Court of Appeals Faithfully Followed *Rowan* and *Frisby*.

The Seventh Circuit's decision is entirely consistent with this Court's longstanding endorsement of the right to residential privacy, discussed comprehensively in *Rowan* and recently reaffirmed in *Frisby*:

> "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," and have recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."

Frisby, 487 U.S. at 484 (citations omitted).

In language directly relevant to the issues here, this Court reiterated the right of the citizen to avoid speech intruding upon residential privacy and the concomitant right of government to enact legislation to facilitate the exercise of that right:

> One important aspect of residential privacy is protection of the unwilling listener. Although in many locations we expect individuals simply to avoid speech they do not want to hear, the home is different. "That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970). Instead, a special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom.

Id. (citations omitted). As this Court held in *Rowan*, "a mailer's right to communicate must stop at the mailbox of an unreceptive addressee." 397 U.S. at 736-37.

The Realtors now claim that the Seventh Circuit erred in finding that *Rowan* provided dispositive (but not exclusive) support for the constitutionality of the ordinances.

Surely the court was correct, however, that the solicitation ordinances and the federal statute in *Rowan* are "materially indistinguishable for First Amendment purposes." NAR.App. 47, 935 F.2d at 893. Under both the solicitation ordinances and the federal statute, residents are given the right to insulate themselves from a particular category of mail—in *Rowan*, sexually explicit mail; in the Municipalities, real estate solicitations in the home. (Thus, the ordinances are not, as the Realtors claim, distinguishable from the statute in *Rowan* on the basis of the statute's supposed "content neutrality.") As in *Rowan*, the solicitation ordinances circumscribe the Realtors' right to communicate only when residents give an affirmative notice that they wish no further solicitations. And, as in *Rowan*, it is the homeowner, not the Municipal government, who exercises sole discretion whether to receive the solicitations. NAR.App. 40, 46-49, 935 F.2d at 890, 893-94.

Finally, the Realtors' contention that the ordinances somehow "stifle" expression of their viewpoint regarding real estate solicitations is absurd. *See* Petition at 24. Under the ordinances the Realtors are free to engage in noncommercial speech, even that reaching the homes of residents on the nonsolicitation list, in order to complain about the solicitation ordinances, to urge their repeal, or to engage in any other form of noncommercial speech regarding these ordinances. The free and unfettered exchange of ideas is not in any way threatened or adversely affected by these ordinances.

D. The Solicitation Ordinances Provide Clear Warning Regarding the Scope of Prohibited Conduct.

In a one-paragraph argument, the Realtors claim that the court of appeals erred in upholding the solicitation

ordinances against their vagueness challenge. Petition at 25-26. In so arguing, however, the Realtors once again distort the appellate decision by asserting that the court ruled "that it saw 'no substantial risk of miscalculation' if brokers simply 'refrained [sic] from further [sic] communication to these addressees [sic].' " Petition at 25 (*quoting* NAR.App. 52, 935 F.2d at 895). The Realtors have failed to quote the court's entire sentence:

> The clear and unambiguous terms of the ordinances . . . direct the Realtors precisely as to what they must do when they receive a copy of the list of householders who wish to exclude real estate solicitations from their mail: They must simply remove the names of the parties from their mailing lists and refrain from future communication to these addressees who do not desire solicitation.

NAR.App. 51-52, 935 F.2d at 895.

The court obviously did not, as the Realtors contend, hold that Realtors must "cease all arguably protected activity in order to resolve vagueness in the law's terms." Petition at 25. Rather, it held that because of the ordinances' clear and unambiguous terms, there is no need to speculate as to their scope. Long before the court of appeals' opinion, the Municipalities' published enforcement policy spoke with equal clarity: "any business or promotional communication by a real estate broker to a homeowner in his or her home which is not carried out by media of general circulation" is covered by the ordinance, if (but only if) that homeowner is on the nonsolicitation list. There is no vagueness here.

E. The Solicitation Ordinances Are Rationally Related to the Legitimate and Important Governmental Purpose of Protecting Residential Privacy.

The Realtors' equal protection challenge to the solicitation ordinances flies in the face of this Court's holding in *Posadas* that "[i]f there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the First Amendment, the same 'fit' surely is adequate under the applicable 'rational basis' equal protection analysis." 478 U.S. at 344 n.9. The only basis on which the Realtors purport to distinguish *Posadas* (and without any citation to authority) is that it concerned advertising of an activity that the government could ban altogether. Petition at 24. *Posadas*, however, does not stand alone, for in *Fox* this Court reaffirmed that the *Central Hudson* analysis is more rigorous than that employed under the Equal Protection Clause. 492 U.S. at 480. *Fox* did not involve speech that the government could ban altogether, and, indeed, this Court did not even mention that issue in its decision. Both *Posadas* and *Fox*, therefore, provide ample support for the appellate court's conclusion that the solicitation ordinances provided an adequate "fit" between means and ends to satisfy equal protection scrutiny.

II.

THE MUNICIPALITIES' LIMITED REGULATION OF REAL ESTATE SIGNAGE COMPORTS WITH THE FIRST AMENDMENT AND HAS NO ADVERSE EFFECT ON THE DISSEMINATION OF HOUSING INFORMATION.

The Realtors' challenge to the Municipal sign ordinances is grounded in the discredited claim that community aesthetics was not the "real" purpose of the ordinances, but instead was a "pretext" to the Municipalities' intent "to

preserve the racial status quo." Petition at 26. It is too late for that factual contention.

The district court expressly found that the declared purpose of the sign ordinances—the promotion of community aesthetics—was in fact their actual purpose, and found that the Realtors had "adduced no substantial evidence that the stated purposes of the legislation were in any way contrived or pretextual." NAR.App. 107, 713 F. Supp. at 1091. The unanimous appellate court agreed, noting that there was "nothing in the record that leads us to conclude that these aesthetic interests, declared in either the preamble or the text of the ordinances involved, were not the genuine purpose of each ordinance." NAR.App. 54, 935 F.2d at 897. Both courts categorically rejected the Realtors' claims that the ordinances had the effect of squelching speech, or impairing or hindering the ability of minorities to find homes in the Municipalities. NAR. App. 55, 935 F.2d at 897.

The Realtors do not even mention these findings, much less argue or demonstrate that they are clearly erroneous. The Realtors' challenge to the sign ordinances, therefore, like the balance of their Petition, reduces to mere dissatisfaction with the outcome of an extensive trial and carefully reviewed findings. Such claims clearly do not warrant this Court's intervention.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: January 6, 1992

Respectfully submitted,

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APPENDIX

PARK FOREST SOLICITATION ORDINANCE

Park Forest's solicitation ordinance defines "solicitation" as follows:

Sec. 24½-1.

Solicitation means any conduct (excluding advertisement in newspapers, magazines or broadcast media of general circulation) designed or intended to induce the owner of any real property (as hereinabove defined) to sell, rent, exchange, convey, transfer or list for sale or rental such real property.

MUNICIPAL SIGN ORDINANCES

Matteson

159.55 SIGNS

(A) *Purpose.* This section is established to create the standards for a comprehensive and balanced system of signs for the Village to achieve the following purposes:

(1) *Communication.* To facilitate an easy and pleasant communication between people and their environment by authorizing the use of signs which are:

(a) Compatible with their surroundings;

(b) Appropriate to the type of activity to which they pertain;

(c) Expressive of the identity of individual proprietors as well as of the community as a whole;

(d) Legible in the circumstances in which they are seen; and

(e) Respectful of the reasonable rights of other sign owners.

(2) *Public Welfare.* To preserve, protect, and promote the public health, safety, and welfare.

(3) *Balance Economy.* To balance the economy, and the Village business and industrial activity by promoting the reasonable, orderly, and effective display of signs.

(4) *Aesthetic Appreciation.* To protect the physical and mental well being of the general public by encouraging a sense of aesthetic appreciation for the Village's visual environment.

(5) *Architectural Elements.* To ensure that signs are designed as integral architectural elements of the building and site to which they principally relate.

(6) *Private Property.* To preserve the value of private property by assuring the compatibility of signs with surrounding land uses.

(B) *Scope.* No sign shall be constructed, erected, originally painted, converted, altered, rebuilt, enlarged, remodeled, relocated, or expanded until a permit for such sign has been obtained from the Director of Community Development in accordance with the standards and procedures set out in this section. The required fee shall be paid upon application for such permit. However, no permit shall be required for maintenance as outlined in a following paragraph of this section.

(C) *Exemptions.* The following shall be exempt from all but the maintenance and public safety requirements of this code.

(1) *Emblems.* Emblems of governmental or political, civic, philanthropic, educational or religious organizations displayed on private property.

(2) *Government Signs.* Signs of a duly constituted governmental body, including traffic or other similar regulatory devices, directional signs, legal notices, warnings at railroad crossings, and other instructional or regulatory signs having to do with health, hazards, parking, swimming, dumping, etc.

(3) *Memorial Signs.* Memorial signs or tablets listing names of buildings and date of erection, when cut

into any masonry surface or inlaid so as to be part of the building or when constructed of bronze or other incombustible material.

(4) *Addresses.* Address numerals and other signs required to be maintained by law or governmental order, rule, or regulation provided that the content and size of the sign do not exceed the requirements of such law, order, rule, or regulation.

(5) *Directional Signs.* Non-electrical signs, not exceeding 4 square feet (0.37 square meters) in area, which provide instruction or direction and are located entirely on the property to which they pertain to identify rest rooms, public telephones, walkways, parking lot entrances and exits, and features of a similar nature. Such signs may not bear the name of a business enterprise or any other advertising information.

(6) *Holiday Decorations.* Displays of a primarily decorative nature, clearly incidental and customary and commonly associated with any national, local or religious holidays.

(7) *Business Nameplates.* Non-electrical nameplates denoting the business name of an occupation legally conducted on the premises, provided that the sign area does not exceed 2 square feet (0.19 square meters) in area.

(8) *Bulletin Boards.* Bulletin boards, not exceeding 40 square feet (3.73 square meters), for religious institutions where the same are located on the premises of said institutions.

(9) *Warning Signs.* No-trespassing or no-dumping signs, not exceeding 1.5 square feet (0.14 square meters) per sign, and not exceeding 1 per lot, except that special permission may be obtained from the Director of Community Development for additional signs under proven special circumstances.

(10) *Religious and Historic Symbols.* Religious symbols, identification emblems of religious order, or com-

memorative plaques of recognized historical agencies, provided that no such symbol, plaque, or identification emblem shall exceed 4 square feet (0.37 square meters) and provided further that all such symbols, plaques and identification emblems shall be placed flat against a building, stone, or other permanent surface.

(11) *Residential For Sale or For Rent Signs.* Residential For Sale or For Rent signs are exempted to the extent that they conform to the following regulations:

(a) *Illumination.* Such signs shall not be illuminated.

(b) *Size.* No such sign shall exceed 8 square feet (0.74 square meters) in area.

(c) *Location.* All signs shall be located on the lot that they are advertising. No such sign shall be placed more than 15 feet (3.05 meters) from the building line.

(d) *Height.* No such sign or supporting structure shall project higher than 5 feet (1.53 meters) above ground level at that point where it is located.

(e) *Number.* There shall not be more than 1 sign per lot.

(D) *Messages.* The following restrictions shall govern messages permitted on signs:

(1) *Character.* No sign shall be permitted to contain statements, words, or pictures of an obscene, pornographic, immoral character, or which contain advertising matter which is untruthful.

(2) *Traffic Conflict.* No sign shall be permitted which purports to be or is an imitation of, or resembles an official traffic sign or signal.

(3) *Limited Words and Phrases.* No sign shall make use of the words "Stop," "Go Slow," "Caution," "Warning," "Look," "Drive In," "Danger" or any

word, phrase, symbol, or character in such manner as to interfere with, mislead, or confuse traffic.

(4) *Zoning Designation.* No sign shall recite that real property is zoned for land uses, or will be zoned for land uses in the future under the zoning rules and regulations of the Village, when in fact such real estate is not so zoned.

(5) *Land Use Designation.* No sign on real estate shall declare that the property is reserved for or is being held for future land use which is inconsistent with the then existing zoning classification of the Village for the land, or any words of like import of a similar nature.

(6) *Name or Type of Business.* Business or industrial signs shall pertain only to the name of business or type of business conducted on the premises.

(E) *Location.* The following restrictions shall govern sign location:

(1) *Block Exits.* No sign shall be erected or maintained so as to prevent free ingress or egress from any door, window, or fire escape.

(2) *Block Ventilation.* No sign shall interfere with any opening required for ventilation.

(3) *Electrical Conductors.* Signs shall be located in such a way that they maintain horizontal and vertical clearance of all overhead electrical conductors in accordance with National Electrical Code Specifications, depending on voltages concerned. However, in no case shall a sign be installed closer than 2 feet (0.61 meters) horizontally or vertically from any conductor or public utility guy wire.

(4) *Block View.* No sign may be so located as to obstruct the view from a public thoroughfare or an existing sign, display window, or major entrance of an adjacent business.

(5) *Fire Safety.* No sign of any kind may be attached to a standpipe or fire escape or to any other fire-safety related device.

(6) *Traffic Conflict.* No sign shall be maintained at any location where by reason of its position, size, shape, or color, it may obstruct, impair, obscure, interfere with the view of, or be confused with, any traffic control sign, signal or device, or where it may interfere with, mislead or confuse traffic.

(7) *Vision Triangles.* No sign shall be located in any of the following vision triangles formed by intersecting streets. At any intersection where at least one of the intersecting streets is a major or collector street as defined in the Comprehensive Plan of the Village, the sides of the triangle formed by the centerlines of the intersecting streets shall be 120 feet (36.60 meters) in length as measured outward from the point of intersection of said centerlines along such centerlines. At all other intersections, each of such sides shall be 80 feet (24.40 meters) in length.

(8) *Vegetation.* No signs shall be nailed, tacked, or otherwise affixed to trees or other vegetation.

(9) *Added Signs.* No advertising other than a permitted sign shall be placed on any sign support.

(10) *Painted Walls.* No signs shall be painted directly upon the exterior walls of a structure.

(11) *Vehicular Signs.* No vehicle or trailer which has attached thereto or located thereon any sign or advertising device shall be parked so as to be visible from a public right-of-way for the purpose of providing advertisement of products or directing people to a business or activity.

(12) *Off-Site Signs.* No off-site signs are permitted.

(13) *Public Right-of-Way.* No sign may be allowed to encroach upon the public right-of-way or public property. The Director of Community Development may grant exceptions from this requirement for signs

not exceeding 4 square feet (0.37 square meters) in area that direct motorists to places of public interest, including government facilities, schools and churches.

(14) *Residential Lot Lines.* No sign facing the side or rear lot line of an abutting residentially zoned lot shall be located within 50 feet (15.25 meters) of that residential lot line.

(F) *Height.* The following regulations shall govern sign height and clearance:

(1) *Free-Standing Signs.* No free-standing sign shall extend above the roof line of any principal building to which it relates. In no case shall any free-standing sign exceed 30 feet (9.15 meters) in height above grade.

(2) *Wall Signs.* No sign which is fixed to a wall of a building shall extend above the vertical surface of that wall.

(3) *Roof Signs.* One story flat-roofed buildings may have a roof sign which does not extend more than 3 feet (0.92 meter) above the roof line.

(4) *Vertical Clearance.* Any projecting or hanging sign or marquee must have a vertical clearance from the bottom of the sign to the grade below of 9 feet (2.75 meters).

(5) *Vertical Clearance Adjacent to Driveways and Parking Lots.* Any projecting or hanging sign or marquee located within 3 feet (0.92 meter) of a driveway or parking area shall have a vertical clearance from the bottom of the sign to the top of curb of 12 feet (3.66 meters).

(G) *Design and Mounting.* All signs shall be designed, constructed, and maintained to meet the requirements of the Matteson Building Code for wind pressure, dead load, foundations, and other structural and safety requirements. All signs shall be securely anchored in a manner acceptable to the Director of Community Development so they will not swing or come loose, or otherwise endanger persons.

(H) *Illuminated Signs.* All illuminated signs shall be subject to the following requirements:

(1) *Electrical Permit.* All electrical work on illuminated signs and signs with electrical wiring must be covered by a valid electrical permit.

(2) *Relettering.* Relettering which requires a change of electrical piping or sign wiring shall be subject to the approval of the Electrical Inspector.

(3) *Voltage.* The voltage of any electrical apparatus used in connection with the sign shall be conspicuously placed on that apparatus.

(4) *Moving Lights.* Illuminated signs shall not have any flashing, scintillating, travelling or blinking lights or rotating beacons, nor shall any beam of light be projected through a mechanism which periodically changes the color of the light reaching the sign. A sign on which the current time or temperature, or both, is indicated by intermittent lighting changes shall not be deemed to be a flashing sign if the lights do not exceed 40 watts per lamp, the changes are limited to the numerals indicating the time or temperature with no less than 7 seconds between changes, and the sign is in conformance with the other regulations for such signs in this section. A free-standing sign which contains an electronic message reader limited to displays with no less than 7 seconds between changes shall not be deemed to be a flashing sign.

(5) *Adjacent Property.* Signs shall be shaded wherever necessary to avoid casting bright light upon property located in any residential district or upon any public street or park.

(6) *Internal Illumination.* Internally illuminated signs shall permit light to shine through only the lettering and graphic elements of the sign, and shall be controlled to prevent glare.

(7) *Weatherproof Disconnect.* All electrical signs shall have a disconnect within sight of the sign. Outside sign disconnects must be weatherproof.

(I) *Permitted Number, Area and Configuration*

(1) *Sign Area Calculation.* The following methods shall be used to calculate the sign area of various types of signs:

(a) *Free-Standing and Projecting Signs.* For ground signs, pole signs, projecting signs, pylon signs, and roof signs, the sign area shall be calculated by measuring the entire area enclosed within the smallest regular geometric form, or combination of regular geometric forms, which may be inscribed to encompass the perimeter of the sign structure, excluding structural support members extending beyond the frame or background border of the sign. In the case of signs with more than 1 face, the area shall be computed only for the maximum single display surface which is visible from any 1 ground position.

(b) *Flush Signs.* For wall signs, awning and canopy signs, and exterior window signs, the sign area shall be calculated by measuring the entire area enclosed within the smallest regular geometric form, or combination of regular geometric forms, which may be inscribed to encompass all letters and graphic symbols of the sign, including horizontal spacings between such letters and symbols plus any additional portion of the background which is framed by a border, internally illuminated, consisting of a color or tone different than the wall to which the sign is attached, or projects more than 3 inches (7.6 centimeters) beyond the plane of the wall to which it is attached.

(2) *Signs in Residential Districts.* Identification signs for structures other than a dwelling unit are subject to the following regulations:

(a) *Area.* One identification sign per principal use is permitted, provided it does not exceed 10 square feet (0.93 square meters).

(b) *Location.* No such sign shall be closer than 8 feet (2.44 meters) to any side or rear lot line or closer than one-half the depth of the required front yard.

(3) *Signs in Business Districts.* Business and identification signs in business districts are subject to the following regulations:

(a) *Area Without Building.* For business premises which do not contain buildings larger than 400 square feet (37.20 square meters), and which lawfully store their merchandise outside, the permitted sign area shall be calculated on the basis of 0.005 square feet (4.7 square centimeters) of sign area for each 1 square foot (0.93 square meter) of the subject parcel, up to a maximum of 80 square feet (7.44 square meters) of sign area.

(b) *Signs Attached to a Building.*

(i) The area in square feet (square meters) of all signs on a parcel shall not exceed 2 times the number of lineal feet (or 0.61 times the number of lineal meters) of the front of the principal building. Each side of a principal building facing a major public thoroughfare shall be considered a front for these purposes, but no signs based upon the calculation of 1 frontage may be located on another frontage.

(ii) *Number.* Only 1 sign per major thoroughfare frontage may be permitted for each principal business establishment.

(iii) *Location.* The length of such sign shall not exceed 70% of the length of the building wall on which the sign is located. The end of such sign shall be no closer to the ends of that wall or section of wall containing the sign than 15% of the length of that wall.

(iv) *Projection.* Except for movie theater marquees, and except for signs in the C1 district, no sign shall project more than 1 foot (0.31 meter) from the front of the structure. In the C1 district, signs may be permitted to extend over the public sidewalk, but shall not extend further than 6 feet (1.83 meters) or beyond the street-side edge of the public sidewalk, whichever is lesser.

(c) *Free-Standing Signs.*

(i) *Face Area.* Except in the C1 district, the area of each free-standing sign shall not exceed 120 square feet (11.16 square meters). When only 1 sign is erected but 2 are permitted, the surface area of each face of the erected sign may be increased up to an additional 50% of area. In the C1 district, the area of each sign shall not exceed 36 square feet (3.35 square meters).

(ii) *Number.* The number of free-standing signs permitted per business site shall be determined from the table below:

Zoning District	Site Area	Signs Per Amount of Arterial Street Frontage
C1	N.A.	1 total on site
C2	N.A.	1 per 500 feet (152.50 meters)
C3	N.A.	1 per 500 feet (152.50 meters)
C4	2 acres (0.81 hectare) or less	1 total on site
C4	More than 2 acres (0.81 hectare)	1 per 300 feet (91.50 meters)

(iii) *Message Limitation.* Free-standing signs may be used to identify a regional or community shopping center containing a site area of 5 acres (2.02 hectares) or more. Such signs may contain only the name of the shopping center, address of the center, and the center's logo. The names of individual tenants shall not be permitted on such signs.

(iv) *Message Boards.* Signs with changeable lettering may be permitted only as a part of free-standing signs and only upon the specific approval of the Plan Commission.

(4) *Signs in Industrial Districts.* Business and identification signs in Industrial Districts are subject to the following regulations:

(a) *Area Without Building.* For industrial premises which do not contain building areas larger than 400 square feet (37.20 square meters), and which lawfully store their merchandise outside, the permitted sign area shall be calculated on the basis of 0.005 square feet (4.7 square centimeters) of sign area for each 1 square foot (0.093 square meter) of the subject parcel, up to a maximum of 80 square feet (7.44 square meters) of sign area.

(b) *Area Related to Building.* The area in square feet (square meters) of all signs on a parcel shall not exceed 3 times the number of lineal feet (or 0.915 times the number of lineal meters) of the front of the principal building. Each side of a principal building facing a major public thoroughfare shall be considered a front for these purposes, but no signs based upon the calculation of 1 frontage may be located on another frontage.

(c) *Length.* No sign attached to a building shall exceed 70% of the length of the building wall on

which the sign is located. The ends of such sign shall be no closer to the ends of that wall or section of wall containing the sign than 15% of the length of that wall.

(J) *Signs with Unique Conditions*

(1) *Signs for Motor Fuel Dispensing Establishments.* Establishments that dispense motor fuel for sale to the public have been found to be unique because their primary functions are performed out-of-doors in a manner prescribed by State statutes. Therefore, the following regulations apply uniquely to such establishments:

(a) *Signs Attached to the Building.* The total face area of these signs, which includes all signs containing a commercial message, temporary or permanent, visible to the public from outside the building, shall not exceed 250 square feet (23.25 square meters).

(b) *Free-standing Signs.* The total face area of all free-standing signs shall not exceed 300 square feet (27.90 square meters). One free-standing sign may be permitted a height of 30 feet (9.15 meters) above grade. Two additional free-standing signs with a maximum height of 8 feet (2.44 meters) above the adjacent street curb level may be permitted.

(c) *Additional Signs.* In addition to the signs permitted by other sections of this code, the following signs are permitted to motor fuel stations.

(i) Two signs per pump island which designate the function of the island as "self service" or "full service." Such signs shall not have more than 2 faces and shall not exceed 3 square feet (0.28 square meter) per face.

(ii) One sign per type of fuel sold which designates the price of that fuel. Such signs shall not have more than 2 faces and shall

not exceed 6 square feet (0.56 square meter) per face. The sign area for more than 1 type of fuel may be combined into 1 sign.

(iii) One non-illuminated sign identifying the service performed in each service bay may be placed over the opening to each bay. Such signs shall have 1 face and shall not exceed 3 square feet (0.28 square meter) each.

(iv) One non-illuminated nameplate identifying the owner or operator is permitted adjacent to the doorway of the station. Such nameplate shall have 1 face and shall not exceed 2 square feet (0.19 square meter) in area.

(v) Temporary signs advertising batteries, tires, oil or other products directly related to motor vehicles, if the signs are located directly adjacent to a display of the product(s) described. Such signs may have 2 faces, however, their total area shall not exceed 10 square feet (0.93 square meter).

(vi) Any signs required by the State of Illinois or the Federal Government.

(d) Where the dispensing of motor fuel is only one of the business activities conducted on the premises, the unique sign conditions permitted in the paragraphs above apply only to the motor fuel dispensing operation and not to the other uses.

(2) *Real Estate Signs.* Signs for the sale or rental of real estate have been found to be unique because the premises upon which such signs are located is the product advertised and the scale of that product is quite large. Because of this uniqueness, a sign may be permitted for the purpose of selling or renting any lot or group of lots and/or any existing or proposed

building or group of buildings or segment thereof (excluding individual residential dwelling units) based upon the following regulations:

(1) *Eighty Square Feet or Less.* Signs with a surface area of 80 square feet (7.44 square meters) or less.

(i) *Procedure.* Such signs shall be reviewed, and a sign permit may be issued by the Director of Community Development. The sign permit shall be valid for 1 year, after which time it may be renewed by annual application and payments of the required fee to the Community Development Department.

(ii) *Area.* The allowable surface area shall be based upon 1 square foot (0.093 square meter) of sign area for each 1 foot (.031 meter) of lineal building frontage, if developed, or vacant land frontage if undeveloped, not to exceed 80 square feet (7.44 square meters).

(iii) *Length.* The length of such sign shall not exceed 70% of the length of any building wall on which the sign is located.

(iv) *Number of Signs.* The number of signs permitted shall be based upon the total acreage (hectares) of the site.

Number of Acres (Hectares)	Number of Signs Permitted
Fifty or less (20.24)	1
Between 50 - 100 (20.24 - 40.49)	2
Greater than 100 (40.49)	3

(v) *Location.* Not more than 1 sign shall be permitted on each street frontage of the property being advertised.

(vi) *Existing Special Use Permit.* No sign(s) provided for in this section of the code shall be permitted if the property has a special use permit in effect for an existing sign having a surface area in excess of 80 square feet (7.44 square meters).

(b) *Greater Than Eighty Square Feet.* Signs with a surface area greater than 80 square feet (7.44 square meters).

(i) *Special Use Permit.* Signs with a surface area greater than 80 square feet (7.44 square meters) may be permitted when required by unique conditions, but only after obtaining a special use permit approved by the Village Board upon recommendation of the Plan Commission. Such special use permit shall be formally reviewed annually by the Director of Community Development for compliance.

(ii) *Required Findings.* Granting of a special use permit for such signs shall be conditioned upon due consideration and findings on the following factors:

- Necessity of sign due to unique conditions of the site or market.
- Nature of surrounding land use.
- Size of property.
- Size of proposed sign.
- Traffic safety.
- Size and nature of existing/proposed development (if applicable).

(iii) *Cancellation.* If, at the required annual review or any other time, the Director of Community Development finds that the conditions related to the evaluation factors above have changed significantly, he may recommend to the Board of Trustees that the special use permit for such signs be terminated. The Board may revoke such permit without public hearings.

(iv) *Sign Permit.* Should a special use permit be granted or renewed, a sign permit may be issued by the Community Development Department upon proper application and payment of the required fee. Such fee shall be payable annually at the time of the formal review of the Director of Community Development.

(3) *Temporary Signs.* There are unique events which may warrant the temporary permission of signs not otherwise permitted. Such temporary signs shall be governed by the following regulations:

(a) *Area.* A temporary sign shall not exceed 1 square foot (0.093 square meter) of sign area for each 1 lineal foot (0.305 meter) of the length of the wall of the principal building which contains the primary entrance to the establishment, up to a maximum area of 100 square feet (9.30 square meters).

(b) *Number.* Only 1 temporary sign is permitted, unless the principal building fronts on more than 1 public street, then 1 sign may be mounted on each street frontage. However, the total area of all such signs shall not exceed 100 square feet (9.30 square meters).

(c) *Location.*

(i) *Zoning Districts.* Temporary signs are permitted only in Commercial and Industrial Zoning Districts.

(ii) *Mounted Flush.* All signs shall be mounted flush with the building wall upon which they are located, except in the case of free-standing signs designating a grand opening, which may be permitted by the Director of Community Development.

(d) *Type and Construction.*

(i) *Safe Mounting.* All signs shall be securely anchored so that they will not swing, sway in the wind, or endanger users of sidewalks or roadways.

(ii) *Cloth Signs.* All signs constructed of cloth or other weak and combustible materials shall be securely attached to their supports. They shall be removed as soon as they are torn or damaged at the discretion of the Director of Community Development.

(iii) *Free-Standing Signs.* No free-standing signs are permitted, except in the case of a "Grand Opening." These signs may be permitted only upon the specific approval of the Director of Community Development.

(iv) *Partially Unsecured Signs.* No pennants, streamers, balloons or any other partially unsecured signs are permitted except as provided herein. Pennants and/or flags may be permitted on the specific approval of the Board of Trustees subject to the following conditions:

- Pennants and/or flags shall only be permitted in conjunction with retail businesses having a permanent outdoor display area of merchandise offered for retail sale as regulated by this Code.
- The erection of pennants shall be limited to the immediate area containing the outdoor display, and shall not exceed a height of 20 feet (6.10 meters).

- Upon approval of the Board of Trustees, a permit may be issued by the Community Development Department for pennants to be erected on a zoning lot once per calendar year for a period not to exceed 6 months.
- All pennants and/or flags erected for display purposes shall be maintained in an orderly fashion. Torn and badly faded pennants and/or flags shall be immediately taken down or replaced at the discretion of the Director of Community Development.

(v) *Electrical Installations.* No temporary sign construction of combustible materials may have any electrical wiring as a part of the sign, nor shall any temporary sign be internally illuminated.

(vi) *Length.* The length of a temporary sign shall not exceed 70% of the length of any building to which it is attached.

(e) *Duration and Frequency.*

(i) *Grand Opening.* Temporary signs designating a "Grand Opening" may be erected within 6 months of obtaining an original business license. Said sign may be erected for a period not to exceed 15 calendar days.

(ii) *Other Temporary Signs.* Temporary signs may be permitted at any business location not more than 2 time periods during any calendar year. Each time period shall not exceed 10 calendar days in length.

(f) *Procedure.* The Village of Matteson reserves the right to review any proposed temporary sign for compliance and to reject any sign that is deemed unsafe or not in keeping with the intent of this code.

(i) *Grand Opening Signs.* All free-standing "Grand Opening" sign applications must be approved by the Director of Community Development. He shall take into consideration the size of the proposed sign, its proposed duration, any colors or illumination, traffic safety, public safety, the impact upon adjacent properties, and general compliance with this code.

(ii) *Civic, Charitable or Religious Signs.* Temporary signs of civic, charitable or religious nature are exempt from the provisions contained in this section, but shall require the specific approval of the Director of Community Development.

(iii) *Other Temporary Signs.* All other temporary signs shall be reviewed by the Director of Community Development for compliance.

(4) *Flags.* Flags of governmental, civic, philanthropic, educational or religious organizations displayed on private property are permitted subject to the following regulations:

(a) *Number.* There shall be a maximum of one flag pole for each zoning lot except as may otherwise be allowed by a special use permit.

(b) *Height.* The height of a flag pole above grade shall be in proportion to the scale of the building to which it relates, and in no case shall be higher than the following height limitations:

Building Height	Pole Height
1 - 2 Stories	20 feet (6.10 meters)
3 - 4 Stories	35 feet (10.68 meters)
5 - 7 Stories	50 feet (15.25 meters)

(c) *Length.* The length of a permitted flag on a flag pole shall not exceed one-third the length of the pole upon which it is hung.

(d) *Maintenance.* All flags are to be maintained in an orderly fashion. Torn and badly faded flags shall be taken down and replaced at the discretion of the Director of Community Development.

(5) *Political Signs.* Signs or posters announcing or describing candidates seeking public political office, announcing or describing political issues and data pertinent thereto are permitted subject to the following regulations:

(a) *Area.* Such signs shall contain a sign surface area not to exceed 10 square feet (3.05 meters).

(b) *Location.* Such signs or posters shall not be placed or otherwise erected upon any public right-of-way, nor attached to any building, structure or vegetation thereon, unless displayed on the interior of a window.

(c) *Duration and Frequency.* Signs or posters relating to such candidates for office or issues shall be erected not more than 60 days prior to the election at which such candidates are to be elected or issues voted upon, and shall be taken down by the person or campaign committee or organization promoted by the sign or poster not more than 5 days after the date of the election to which they relate.

(6) *Construction Signs.* Construction signs shall be permitted in all zoning districts for the purpose of denoting the construction of individual buildings or projects. All "Construction" sign applications must be approved by the Director of Community Development. He shall take into consideration the size of the proposed sign, its proposed duration, traffic safety, public safety, the impact upon adjacent properties, and general compliance with this code.

(a) *Number.* No more than 1 construction sign shall be allowed per street frontage per project.

(b) *Height.* No construction sign shall exceed 15 feet (4.58 meters) in height. Signs of a greater height may be permitted upon the specific approval of the Plan Commission.

(c) *Area.* The maximum allowable size of any construction sign located in a residential zoning district shall not exceed 100 square feet (9.30 square meters). The maximum size of any construction sign located in a commercial or industrial zoning district shall not exceed 200 square feet (18.60 square meters), except that signs with a greater area may be permitted upon the specific approval of the Plan Commission.

(d) *Location.* Such signs shall not be placed or otherwise erected upon any public right-of-way, nor attached to any building, structure or vegetation thereon. Such signs shall be situated on the same property as the construction project to which they refer.

(e) *Message.* The content of construction signs shall be limited to the project name/logo; the architect; the engineer; the general contractor; the builder or developer; the lending institution; the business of the establishment under construction; its opening date; the type of residential units being offered; and information pertaining to the price of such residential units, financing and amenities.

(f) *Duration.* No construction sign shall be erected any earlier than 60 days prior to the actual commencement of construction. Such signs shall be removed within 10 days after completion of construction and prior to occupancy.

(7) *Subdivision Monuments or Identification Signs.* Monuments or signs that identify particular residential subdivision or unified residential neighborhood may be permitted subject to the following regulations:

(a) *Location.* Such signs shall be located at points where subdivision streets intersect with arterial streets (as designated by the Comprehensive Plan).

(b) *Maintenance.* Subdivision monuments or identification signs are to be maintained in an orderly manner. Such signs are to be kept clean and in good repair. Signs not property maintained may be removed by order of the Board of Trustees.

(c) *Procedure.* The Village of Matteson reserves the right to review any proposed subdivision monuments or identification signs for compliance and to reject any sign that is deemed unsafe or not in keeping with the intent of this code. Subdivision monuments or identification signs shall require specific approval by the Board of Trustees upon recommendation of the Plan Commission. The Board shall take into consideration the size of the proposed monument or sign, any colors or illumination, traffic safety, public safety, the impact upon adjacent properties, and general compliance with this code.

(K) *Maintenance.* All signs (including those for which no permit is required) and their supports shall be kept in a safe, presentable, and good structural condition in accordance with the following requirements and with the applicable codes or ordinances of the Village of Matteson as determined by the Director of Community Development.

(1) *Clean.* The owner of any sign shall keep the sign and support structure clean and properly treated so as to prevent rust, peeling, flaking, or fading.

(2) *Good Repair.* Broken panels, missing letters, flaking or peeling paint and other damage to a sign or support structure shall be repaired within 30 days of its occurrence.

(3) *Area Around Signs.* The area surrounding all signs shall be maintained free of any debris or nui-

sance, and any related grassed area or landscaping shall be kept trimmed and in a healthy condition.

(L) *Removal of Signs.*

(1) *Public Safety.* Any sign which is an immediate peril to persons or property shall be removed summarily and without notice at the sole discretion of the Director of Community Development.

(2) *Obsolete Message.* Any sign which is located on property which becomes vacant and unoccupied for a period of 3 months or more, or any sign which pertains to a time, event, or purpose which no longer applies, shall be taken down and removed by the owner, agent, or persons having the beneficial use of the structure or property upon which such sign may be found. Permanent signs applicable to a business temporarily suspended because of a change of ownership or management may be granted an additional 3-month time extension by the Director of Community Development after written application.

Park Forest

ARTICLE XIV—SIGNS

Section 31-145. Purpose

(a) The purpose of this article is to provide a legal framework to regulate, administer and enforce outdoor sign display advertising within the Village of Park Forest. With this statement of purpose, the intent of these regulations is to:

(1) Promote clear communication by assuring the public's ability to identify uses and premises without confusion, and by avoiding visual clutter of the physical environment;

(2) Enhance the local economy by promoting the reasonable, orderly and effective display of information, appropriate to the type of activity to which it pertains;

(3) Enhance the physical plan of the Village by protecting its character and beauty; and

(4) Protect the safety and welfare of the public by regulating the type of materials, construction and maintenance of outdoor signs.

(b) Adhering to the above intent, signs of alternative sizes and standards may be considered for approval if submitted as part of an overall development proposal, or as modifications to existing developments under the PUD provisions of this Chapter. Alternative signs submitted as modifications to existing developments shall be approved by resolution of the Board in accordance with the provisions of Section 31-87(E).

(c) Adoption of this article does not affect any signs previously approved and in conformance with the standards for maintenance as set forth in Sections 8 and 16 of this Code.

Section 31-146. General Provisions

(a) *Sign.* A sign is any visual device or representation designed or used for the purpose of communicating a message or identifying or attracting attention to a premise or activity, with or without the use of words, which is visible from outside the premises on which it is located.

(b) *Sign Area.* The size of a sign or sign area shall be computed as the largest single face within a perimeter which forms the outside shape of the sign, including any frame that forms an integral part of the display. Copy shall be permitted on both sides of the sign area.

(c) *Permit Required.* No signs, except those specifically exempted from these provisions by Section 31-147, shall be erected, affixed, replaced, hung or otherwise displayed or altered, unless a permit therefor has

been issued by the Village of Park Forest, in accordance with the regulations of this article. No permit shall be required for repairing a sign.

(d) *Applications.* Each application for a sign permit shall be made in writing upon forms furnished by the Village Manager and shall contain or have attached thereto the following information:

(1) A drawing approximately to scale, showing the design of the sign, including size, character and color of letters, dimensions, method of attachment or support materials, source of illumination and showing the relationship to any building or structure to which it is proposed to be installed or affixed; and

(2) A plot plan approximately to scale indicating the location of the sign relative to property lines, easements, streets, sidewalks and other signs. For free-standing signs, landscaping at base of sign must be illustrated.

(e) *Construction and Maintenance.* Signs must be constructed of durable materials, in accordance with the provisions of Chapter 8 of this Code, and must be maintained in good condition. The Building Commissioner is hereby authorized to inspect all signs, and shall order the repair or removal of any sign not adequately maintained.

(f) *Discontinued Activity.* Any sign which advertises an activity, business, product or service which has ceased operation or production shall be removed within six (6) months of the discontinuance of said activity.

Section 31-147. Exempt Signs

A permit shall not be required for the signs covered by the provisions of this Section; such exceptions, however, shall not be construed to relieve the owner of the sign from responsibility for its erection and maintenance in a safe manner.

(a) Official government traffic, directional and informational signs and notices.

(b) Permanent signs or temporary window graphics located completely within an enclosed building provided that the maximum sign area shall not exceed twenty-five (25) percent of the window in which it is displayed; provided further that no flashing sign of any size or covering any area may be visible from outside of the premises.

(c) The flag, emblem or insignia of a nation, political unit, or civic, philanthropic, educational or religious organization.

(d) One non-illuminated "for sale" or "for rent" sign, per parcel of real estate, provided that the sign be placed on such parcel being offered for sale or rent. In residential districts, the sign area may not exceed five (5) square feet. In commercial and industrial districts, the maximum sign area may not exceed twenty (20) square feet, and advertise exclusively the sale of the land or building upon which the sign is displayed, provided:

(1) Such sign states the date on which said sign was erected;

(2) No "sold" sign may be erected unless it replaces a previously existing "for sale" sign; and

(3) "Sold" signs shall be removed upon closing of a sale.

(e) One non-illuminated nameplate for each dwelling unit in all residential districts, identifying only the name and address of the occupant and not exceeding one (1) square foot in area.

(f) For multiple-family dwellings, or a group of multiple-family dwelling structures having a common driveway entrance from a public street, one sign for each common entrance not exceeding two (2) square feet in area, identifying the addresses of dwelling units.

Section 31-148. Prohibited Signs

(a) Signs imitating warning signals are prohibited. No sign shall display lights resembling the flashing lights customarily used in traffic signals or in police, fire, ambulance, or rescue vehicles; nor shall any sign use the words, slogans, dimensional shape and size, or colors of governmental traffic signs.

(b) No commercial signs are permitted within any street right-of-way.

(c) Flashing signs are prohibited in all zoning districts, whether located within or without a building, if plainly visible from the outside.

(d) Signs which move mechanically, whether by animation, revolution, movement up or down, or movement sideways, are prohibited in all zoning districts.

(e) Commercial signs located in the interior of a parked vehicle are prohibited.

Section 31-149. Permitted Signs—Residential District

(a) The following described signs shall be permitted in a residential district, subject to the approval and limitations as herein specified:

(1) *Residential Development Identification Signs.* Signs designating the name of the residential development, the location and telephone number of the management or leasing office; provided that such signs shall be no larger than ten (10) square feet in area, and shall be no higher than six (6) feet as measured from the adjacent curb. The number and location of residential development signs shall be approved by the Village Manager.

(2) *Temporary Construction or Architect's Signs.* One non-illuminated sign on the site of construction in progress for no longer than ten (10) days after an occupancy permit has been issued for such new construction; provided that such sign

shall not exceed twelve (12) square feet in area and six (6) feet in height.

(3) *Religious Institutions Bulletin Boards.* One sign per site of a religious institution not exceeding twenty (20) square feet in area and six (6) feet in height; provided however that in the event such religious institution is located on a corner lot with public entrances from both streets, one such sign shall be permitted for each street frontage.

(4) *Public Building Identification Signs.* One primary building sign per public building as described in Section 31-150, for PC-1 Districts, and one free-standing identification sign not to exceed fifty (50) feet square feet in area, or six (6) feet in height, as measured from the adjacent curb.

(5) *Service Organization Signs.* All service organization signs only if attached to structures to be provided by the Village at appropriate locations.

(6) *Special Events or Temporary Announcement Signs.* Temporary signs which announce special events of a community nature may be erected upon public lands or institutional or religious sites upon approval of the Board of Trustees, provided such signs be constructed of durable materials, and not exceed thirty-two (32) square feet in area nor six (6) feet in height. Cloth or banner signs may be approved.

(7) *Special Real Estate Signs.* One special real estate sign for the purpose of selling or leasing a group of lots and/or any existing or proposed building or group of buildings for an area of two or more adjacent lots; provided that such sign shall not exceed thirty-two (32) square feet in area. Approval shall be granted for no longer than one year. Signs must be removed after sale or lease of the property.

(b) *Location and Illumination.* The foregoing permitted signs shall be limited as to location and illumination as follows:

(1) *Location.* All signs permitted in residential districts shall be set back not less than five (5) feet from the property lines, except for ground signs not over ten (10) inches in height which bear street address numbers only. Residential development identification signs may be permitted in Village right-of-way; and

(2) *Illumination.* Illumination of permitted signs, other than specified in (2) above, shall be accomplished by reflected light only and all lighting devices shall be so located and shielded as to prevent glare upon the street or adjacent property.

Section 31-150. Permitted Signs—Commercial (PUD-PC-1, PC-2) and Industrial Districts (POR, M-1)

A. The following signs shall be permitted in commercial (PUD-PC-1, PC-2) and industrial districts (POR, M-1) subject to the limitations herein specified:

(1) *Business Sign—Primary.* Each occupancy per storefront shall be permitted one primary business sign for each exterior building wall enclosing such occupancy provided that the exterior wall faces a public street or the interior of a shopping center. In PC-1 districts, the sign area shall not exceed one and one-half (1½) square feet for each lineal foot of the exterior building wall relative to the occupancy. In PC-2, POR and M-1 districts, the sign area shall not exceed two (2) square feet for each lineal foot, as above. In no event shall the maximum sign area exceed two hundred (200) square feet. Display shall be in one of the following described manners:

(a) Signs shall be mounted flat against or painted on the building wall, with no sign projecting more than twelve (12) inches from the wall surface. The lowest portion of said sign shall be not less than nine (9) feet above grade elevation below. If said sign is mounted on a building wall, no portion thereof shall project above or beyond the wall perimeter, if mounted on a roof, no portion of said sign shall project above or beyond any portion thereof; or

(b) Individual letters, mounted on a canopy or marquee, provided such sign does not project more than two (2) feet above the canopy or marquee deck; the letters shall not exceed one and one-half (1½) feet in height in the PC-1 district, or two (2) feet in the PC-2 district, and the sign area shall conform to paragraph (a) above. Canopies and marquees are not permitted in industrial districts.

(2) *Business Sign—Secondary.* Each occupancy per storefront shall be permitted one secondary sign containing only the name of the occupant; provided that such secondary business signs shall not exceed an area of four (4) square feet, and display shall be in one of the following manners:

(a) Mounted flat against the building wall with no portion of the sign projecting more than six (6) inches from the wall surface; or,

(b) Suspended from a marquee or canopy (commercial districts only).

(3) *Freestanding Sign.* One freestanding sign shall be permitted per shopping center. One freestanding sign shall be permitted for an individual enterprise not part of a shopping center which occupies an entire building on a distinct, legally

described parcel of land. Additional freestanding signs for a shopping center shall be permitted only upon the approval by resolution of the Board of Trustees, which shall have received advice from the Plan Commission.

Any permitted freestanding sign shall be located only on the privately owned property to which the sign pertains, not less than five (5) feet from a front or side lot line, and shall conform to Section 31-119(g) of this Code. Exact location shall be approved by the Village Manager. All freestanding signs shall have suitable landscaping materials, in accordance with guidelines furnished by the Village, and be subject to the following limitations:

(a) In the PC-1 district, shopping center signs shall be no larger than thirty (30) square feet, nor shall the height exceed six (6) feet;

(b) In the PC-2 district, shopping center signs shall not exceed seventy (70) square feet in area, nor shall the height exceed twenty (20) feet; or

(c) An individual enterprise sign shall have an area not to exceed thirty (30) square feet, nor shall the height exceed six (6) feet, except for locations on Lincoln Highway, where the sign area may not exceed forty (40) square feet, nor shall height exceed six (6) feet.

(4) *Service Entrance Sign.* A sign not exceeding six (6) square feet in area, for purposes of identifying each service entrance of the occupancy, may be mounted flat on the service door or the adjacent wall surface.

(5) *Temporary Construction or Architect's Signs.* One non-illuminated sign on the site of construction in progress for no longer than ten (10) days after an occupancy permit has been issued for

the new construction; provided that such sign shall not exceed fifty (50) square feet in area.

(6) *Special Events or Temporary Announcement Signs.* Temporary signs which announce special events of a community nature may be erected upon approval of the Board of Trustees. Signs must be constructed of durable materials and may not exceed thirty-two (32) square feet in area nor six (6) feet in height. Cloth or banner signs may be approved.

(7) *Special Real Estate Signs.* One special real estate sign for the purpose of selling or leasing a lot or group of lots and/or any existing or proposed building or group of buildings provided that such sign shall not exceed sixty-four (64) square feet in area. Approval shall be granted for no longer than one year. Signs must be removed after sale or lease of the property.

(8) *Electronic Time and Temperature Signs.* Must follow PUD procedures.

(9) *Special Commercial Promotions.* Temporary signs, including pennants, banners and freestanding signs may be approved for a period not to exceed ten (10) days, not more than twice in a twelve month period, and not less than thirty (30) days apart for special commercial events or promotions provided that any freestanding sign shall not exceed thirty-two (32) square feet in area nor six (6) feet in height from the ground.

B. *Illumination*—Permitted signs, other than (5) above, may be illumined in one of the following manners:

(1) Silhouette lighting, where the light source is concealed from direct view;

(2) Spotlight, whereby the illumination is concentrated on the sign face in such a manner as to prevent glare on the street or adjacent properties; or

(3) Bulbs or tubes, only in commercial districts.

Country Club Hills

WHEREAS, the enactment of zoning standards are necessary for the promotion of the general welfare of the public, and

WHEREAS, these standards may impose reasonable restrictions to preserve the proper character of the residential zoning districts within the city, and

WHEREAS, the comprehensive sign standards ordinance recently enacted has been carefully designed to regulate the intrusion of commercial signage within residential zoning districts, and

WHEREAS, the regulation of real estate signs in residential zoning districts represents a legitimate and proper exercise of the city's authority to enforce reasonable zoning restrictions,

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF COUNTRY CLUB HILLS, ILLINOIS, as follows:

SECTION 1: Section 11 of Article 11 of Chapter 15 be and is hereby deleted and the following Section 15.11.11 substituted in lieu thereof:

15.11.11 REAL ESTATE SIGNS:

Signs that have for their purpose or intent the selling or renting of real estate located in residential zoning district, such as, but not limited to signs that contain the words "for sale", "for rent", or any similar language shall conform with the following provisions:

A. No more than one real estate sign shall be erected on any premises.

B. No real estate sign shall exceed three square feet in area and the top surface shall not exceed three feet above existing grade at the point of erection.

C. Real estate signs shall be erected parallel to the front side of any building and shall be placed no more than 3 feet from the front foundation wall.

D. Prior to erection of any real estate sign, the owner of any property within the city or his agent shall file an application in accordance with the provisions of Chapter 14 of this Code.

E. No real estate signs shall contain the words "sold", "leased", or any similar language.

F. No real estate signs shall be an illuminated sign.

SECTION 2: Paragraph A of Section 14.11.01 of the Municipal Code be and is hereby deleted and the following substituted in lieu thereof:

A. No permanent sign over 20 square feet nor any real estate sign of three square feet or less shall be erected structurally or moved until the person proposing to erect, alter, or move such sign shall have obtained a permit from the city.

SECTION 3: Section 14.11.01 be and is hereby amended by the addition of the following Paragraph C:

C. Sign permits shall be valid for a period of 180 days, except that, in the case of real estate signs, said permits shall be valid only until the property is placed under contract to be sold or leased.

SECTION 4: Paragraph A3 of Section 14.8.01 be and is hereby deleted and the following substituted in lieu thereof:

Signs	Fee Basis	Minimum Fee
Permanent (over 20 sq. ft.)	$0.10/sq. ft.	$5.00
Real Estate	$0.10/sq. ft.	$5.00

SECTION 5: The following definitions be and are hereby deleted from Section 15.2.01 of the Municipal Code:

Lending Institute	Real Estate Salesman
Panic Peddling	Real Estate Transaction
Real Estate Agent	Sales
Real Estate Broker	Steering

SECTION 6: Paragraph I of Section 15.11.08 be and is hereby amended as follows:

I. Temporary signs no larger than 5 square feet presenting information of a political nature concerning State, County, Municipal or other governmental body election, or advertising special events of charitable or public groups. Such signs may remain for fifteen (15) days and must be removed upon close of the event.

SECTION 7: Paragraph M be and is hereby added to Section 15.11.08 as follows:

M. Garage sale signs no larger than 3 square feet. Such signs may remain for 7 days on private property with permission and must be removed upon close of the event.

SECTION 8: All ordinances or parts of ordinances in conflict with the provisions hereof are hereby repealed to the extent of such conflict. Should any portion of the ordinance be found invalid for any reason, such findings shall not invalidate any remaining section or portion hereof.

University Park

WHEREAS, the Village has sought reasonably to regulate the use of all types of signs in the Village because of its desire to protect the esthetically pleasing qualities of the Village as a wooded, suburban-rural, and visually open area;

WHEREAS, on the other hand, the Village also recognizes that the reasonable display of signs may constitute a public service useful to the conduct of competitive business enterprise;

WHEREAS, the Village is aware that ordinances affecting the use of signs are subject to some degree of legal uncertainty, due to the difficulty of the legal issues involved and the differences in local histories and situations addressed by various of such ordinances; and

WHEREAS, the Village desires to apply to nonilluminated real estate signs in a residential district the same or similar standard as that applicable to political signs;

NOW THEREFORE, BE IT ORDAINED BY THE PRESIDENT AND BOARD OF TRUSTEES OF THE VILLAGE OF UNIVERSITY PARK, COOK AND WILL COUNTIES, ILLINOIS, AS FOLLOWS:

Section 1. Section 1272.07(a)(2) of the Codified Ordinances of the Village of University Park is hereby deleted in its entirety and the following is inserted in its place and stead:

> 1272.07(a)(2):
> Except for the sale of unimproved parcels of land of five acres or more, no real estate sign shall be erected, exhibited, displayed or maintained outdoors in a residential district; however, a real estate sign, including a for sale sign, may be placed in a window of a residential dwelling.

MUNICIPAL ENFORCEMENT POLICY REGARDING SOLICITATION ORDINANCES

As you know, the City of Country Club Hills has a Solicitation Ordinance, which prohibits Real Estate Solicitation in the home of Country Club Hills Residents who have previously notified the Real Estate Community (through the City) of their desire not to sell their homes and not to be solicited. Although the terms of the Ordinance are clear and unambiguous in our view, some Real Estate Agents have raised questions about the City's policy as to protections of solicitations where a home has been offered for sale by owners after it had been listed with a Real Estate Agent. To remove any doubts about that, we are providing this memorandum. Please give each of your sales associates a copy.

> The Solicitation Ordinance defines "solicitation" as follows:
>
> > "Solicit" or "solicitation" means any communication by or on behalf of a Real Estate Agent with the owner or occupant of a dwelling (i) which is intended to induce a sale, rental or listing of such dwelling, (ii) which is intended to offer or promote services in connection therewith, and (iii) which is carried out by means of any of the following:
> >
> > (a) in-person contacts at the dwelling;
> >
> > (b) written material mailed or delivered directly to the dwelling such as direct mail, leaflets or pamphlets; and
> >
> > (c) telephonic contacts with the owner or occupant of the dwelling.

City of Country Club Hills Codified Ordinance Ch. 19.5.01(a).

It is the City's view that *any* business or promotional communication by Real Estate Agent to a Homeowner in his or her home is intended directly or indirectly, to generate business, *i.e.*, to solicit a sale or listing, and therefore is a "solicitation" under the Ordinance. As you

will note, the Ordinance does not distinguish between solicitations intended to generate immediate sale or listing and those intended to solicit a sale or listing at some future time (such as "farming" solicitations). The Ordinance's definition does not require that the word "solicit" be used in the communication or that the communication directly ask the homeowner to sell or list his home. In reality, virtually any communication (however bold or subtle) from a Real Estate Agent to a Homeowner is in pursuit of a sale or listing sooner or later. Therefore, the terms "solicit" or "solicitation" in the Ordinance include any business or promotional communication by a Real Estate Agent to a Homeowner in his or her home which is not carried out by media of general circulation, and the City will treat such a communication to a resident on the list as a violation of the Ordinance.

The City will not pursue an enforcement action against Real Estate Agents, however, who solicit Homeowners who are on the list, but who have listed their homes for sale with a Real Estate Agent or Broker, or have administered their availability for sale by owner. In such cases, the homeowner does wish to sell his home, contrary to the wishes he or she expressed when signing up on the list. We are requesting that Homeowners on the list inform the City of such changes in their wishes, and we will delete their names from the list upon receipt of that notice. We will inform realtors of these deletions in accordance with our usual procedure. Such homeowners will have to send in another non-solicitation card to be put back on the list.

Supreme Court, U.S.
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No. 91-925

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREATER SOUTH SUBURBAN BOARD OF REALTORS, an Illinois not-for-profit corporation and NATIONAL ASSOCIATION OF REALTORS, an Illinois not-for-profit corporation,

Petitioners,

v.

CITY OF BLUE ISLAND, VILLAGE OF CALUMET PARK, CITY OF COUNTRY CLUB HILLS, VILLAGE OF GLENWOOD, VILLAGE OF HAZEL CREST, VILLAGE OF MATTESON, VILLAGE OF PARK FOREST, VILLAGE OF RICHTON PARK, VILLAGE OF UNIVERSITY PARK, and SOUTH SUBURBAN HOUSING CENTER, an Illinois not-for-profit corporation,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONERS

ARGUMENT

The Opposition Briefs of the Respondents[1] confirm two essential points favoring review of this case. The Municipalities acknowledge that they have imposed special restraints on advertising by real estate brokers in order to influence residents' race-based housing choices. The South Suburban Housing Center ("SSHC") concedes that "thousands" of other communities and governments may look to this case for guidance in discerning government's proper role, if any, in maintaining racial balance in the housing market. These concessions, coupled with Respondents' failure to rebut Petitioners' other arguments, establish that this Petition presents substantial and urgent questions that test the applicability of this Court's free speech and affirmative action principles to housing markets, and will shape the future of race relations throughout the nation's residential areas.

I. THE ANTI-SOLICITATION ORDINANCES VIOLATE PETITIONERS' FIRST AMENDMENT, EQUAL PROTECTION AND DUE PROCESS RIGHTS.

A. The Municipalities' Brief Confirms That They Enacted The Ordinances To Further Their Integration Maintenance Policies.

After spending four pages (Munic. Br. at 1-5) denying that race explains their decision to single out real estate advertising for special suppression—and lambasting Petitioners for suggesting otherwise—the Municipalities promptly reverse themselves and effectively admit Petitioners are correct. The Municipalities contend that suppression of real estate advertising is "particularly appropriate"

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[1] Petitioners cite the Petition as "Pet.," the Municipalities' Brief as "Munic. Br.," the Housing Center's Brief as "SSHC Br.," the Appendix to the Petition as "App.," and the Appendix to the Municipalities' Brief as "Munic. App." We cite the trial transcripts as "Tr." and Petitioners' trial exhibits as "DX."

because, although Petitioners' speech "concerns lawful activity and is not misleading" (App., p. 39), it vaguely reminds some residents of different practices conducted by different brokers in a different city several decades ago. (Munic. Br., pp. 5-6, 21.) Consequently, these residents "perceive" real estate advertising as "destabilizing to an integrated community." (*Id.*, p. 6; App. 114.) As both lower courts found, therefore, the Municipalities enacted the anti-solicitation ordinances to counter the effect this perception might have on residents' housing choices:

> Indeed counterdefendants' witnesses testified that the anti-solicitation ordinances are based on the desire to protect residents from exposure to advertising because this information might cause homeowners to question the racial stability of their communities or re-evaluate their decisions to live there. As with the "for sale" sign bans, the ordinances are designed to keep residents from moving, to maintain the status quo and to reduce the ability of homeseekers to find homes in the municipalities.

(App., pp. 12, 113 (citations omitted).)

This purpose cannot justify a restriction on real estate advertising. As the Sixth Circuit Court of Appeals recently held, this Court's decisions have permitted greater regulation of commercial speech than "pure" speech only when the "governmental interest asserted is either related to regulating the commerce the 'commercial speech' is promoting, or related to any distinctive effects such commercial activity would produce." *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 465 (1991). The Municipalities, however, have no legitimate interest in regulating the private housing decisions that real estate advertising concerns. *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 87, 96 (1977) (The First Amendment denies government the power to restrict dissemination of information simply because it may cause residents to move away). Thus the Municipalities' attempt to dismiss

the conflict between this case and *Discovery Network* (Munic. Br., p. 18 n.8) fails. Unlike the Court of Appeals in this case, the *Discovery Network* court properly accorded real estate advertising "a high value" in the relevant First Amendment calculus. 946 F.2d at 471; *see Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n*, 447 U.S. 557, 566 n.9 (1980) ("We review with special care regulations that entirely suppress commercial speech in order to pursue a non-speech related policy"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Cons. Council*, 425 U.S. 748, 763 (1976) ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate").

Given the high value of speech concerning private housing choice, it is a constitutionally acceptable burden to ask residents simply to throw away one more piece of mail, or hang up on one more caller, to avoid a broad prohibition on such speech. *Bolger v. Youngs Drug Prods.*, 463 U.S. 60, 72 (1983). Thus the anti-solicitation laws fail to advance the Municipalities' purported, post-hoc interest in privacy because real estate advertising is not a constitutionally significant intrusion on residential privacy. And indeed, if the Municipalities and the Court of Appeals cannot discern the constitutional difference between the picketing of single residence, *Frisby v. Schultz*, 487 U.S. 474 (1988), and a holiday card mailed to everyone in town (*see* Munic. Br., pp. 21-22; App., pp. 42-44), then this Court's intervention is urgently needed.

The Municipalities mischaracterize the significance of residents' participation in the municipal anti-solicitation schemes when they suggest residents thereby demonstrate that real estate speech has "no value." (Munic. Br., p. 17.) First, the Municipalities ignore the chilling effect that the ordinances have on brokers, some of whom have abandoned *all* direct advertising in the Municipalities. (*See* Pet., pp.

7-9.) Second, residents who opt into the anti-solicitation scheme may simply have accepted the Municipalities' anti-broker, integration maintenance rhetoric (Pet., pp. 7-8); these residents nevertheless may be willing sellers, either by owner, through the SSHC, or through other brokers who agree to cooperate with municipal integration maintenance programs. Finally, participants may not realize that the Municipalities will use the ordinances to bar *all* real estate advertising, rather than just advertisements urging them to sell or list their homes; those residents might be willing recipients, for example, of an advertisement informing them that a house near theirs would be available to an interested relative or friend. (*E.g.*, DX 200.)

The ordinances restrain a substantial amount of real estate advertising (all bulk mailing and as much as 25% of individual mailing) and chill even more, while they prevent no constitutionally significant intrusion on residential privacy. Consequently, there is no "reasonable fit" between the burden and the benefit of the ordinances. *See Discovery Network*, 946 F.2d at 471 ("minuscule" benefit fails to justify a ban on 15% of plaintiff's real estate advertising).

B. The Anti-Solicitation Ordinances Are Improper Viewpoint Discrimination.

The ordinances stifle only speech by real estate brokers. The SSHC is free to advertise its integration maintenance philosophy. The local chamber of commerce may urge residents not to move away. Even home improvement companies may urge residents to remodel rather than move. Thus the Municipalities have weighed in to mute one discreet perspective on the issue of housing choice. This viewpoint discrimination is not limited to the simplistic commercial/non-commercial distinction suggested by the Municipalities (Munic. Br., p. 23).

The Municipalities bear a heavy burden to justify this discrimination against brokers' viewpoint. Their attempt

to distinguish *Discovery Network* on the ground that it applies strict scrutiny to a content-based restriction on real estate advertising (Munic. Br., p. 18 n.8) echoes rather than refutes Petitioners' argument.

The Municipalities' reliance on an illusory comparison to *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), fails to meet their burden. The fundamental difference between this case and *Rowan* is illustrated by an example drawn directly from *Rowan*. There the Court noted that a householder may bar delivery of a dry goods catalogue if he feels, in his sole discretion, that it is sexually provocative. *Id.* at 737. A resident of one of the Municipalities who concludes the same catalogue disturbs his privacy—*e.g.*, by tempting family members to overspend a strained domestic budget—could do nothing under the anti-solicitation laws, however. The *Municipalities*, rather than the resident, have decided that only real estate advertising disturbs the resident's privacy enough to warrant restriction.

C. The Municipalities' Response To Petitioners' Equal Protection Claim Rests On A Case That Did Not Involve The Equal Protection Clause.

In *Board of Trustees of State Univ. of N.Y. v. Fox*, "the only . . . issue was the students' claim that their First Amendment rights had been infringed." 492 U.S. 469, 473 (1989). The Court referred to the equal protection rational basis standard only for the purpose of clarifying that the "reasonable fit" standard is more exacting than the former standard. *Id.* at 480. Thus the Municipalities are alone in their surprise that the *Fox* Court did not "even" mention the reference in *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 345 (1986), to the "crucial distinction" between advertising of casino gambling and advertising of constitutionally protected activities.

The ordinances substantially restrain only Petitioners' constitutionally protected speech. The Municipalities fail

to justify stifling one group of speakers with reference to any interest but an improper desire to manipulate residents' housing choices. The ordinances deny Petitioners equal protection of the law.

D. The Municipalities Rewrite Their Ordinances To Counter Petitioners' Vagueness Challenge.

The ordinances define "solicitation" as a communication "which is intended to induce the sale, rental or listing for sale or rental" of the dwelling to which the communication is directed. (*E.g.*, App. 143.) The Municipalities, however, have distributed an "enforcement policy statement" redefining "solicitation" as "*any* business or promotional communication by a real estate broker to a homeowner in his or her home. . . ." (Munic. Br., p. 7, emphasis added.) Thus an advertisement offering investment properties or refinancing services would offend the "enforcement policy," even though it plainly is outside the definition contained in the ordinances themselves. The vagueness in the ordinance that permits this confusion and unfettered enforcement discretion violates Petitioners' due process rights.

The Municipalities' Brief attempts to bridge the definitional gap between the ordinances and their "enforcement policy" by again redefining "solicitations" as communications "intended to induce business, sooner or later." (Munic. Br., p. 7 n.4.) Because the "business" of real estate brokers involves much more than generating listing (brokers must also *sell* their own inventory and may sell other brokers' listings, for example), this redefinition substantially expands the scope of the ordinances. That the Municipalities found it necessary to stretch their anti-solicitation ordinances even in their Brief in Opposition is a telling admission that the ordinances and the municipal "enforcement policies" are hopelessly vague and unfair.

II. THE "FOR SALE" SIGN ORDINANCES VIOLATE PETITIONERS' FIRST AMENDMENT RIGHTS.

The Municipalities' attempt to undermine the District Court's finding that they "regulate the use of 'for sale' signs differently from other signs" (App., pp. 104-106, *see* Munic. Br., pp. 11-12) fails because it simply identifies restrictions common to real estate signs and some other signs, while ignoring the differences on which the court based its finding. *Compare, e.g.*, Munic. App., p. 34 *with id.*, p. 36 ("for sale" and garage sale signs share size restriction under Country Club Hills' ordinances, but only "for sale" signs must be placed within three feet of and parallel to the house).

Like the Court of Appeals, the Municipalities disregard the District Court's findings that the sign restrictions are designed to preserve current integration patterns in the Municipalities. (App., pp. 106-107 (citations omitted).) It is not surprising, therefore, that the Municipalities also fail to respond to Petitioners' argument that the District Court's finding that the sign restrictions are a "reasonable" measure to achieve this purpose (*id.*) rests on an erroneous belief in government's power to restrict speech in pursuit of an improper, non-speech related interest in manipulating residential housing choice. The Municipalities also consequently ignore Petitioners' contention that the lower courts' unquestioning acceptance of "community aesthetics" is improper, given the plain evidence, found by the District Court and undisturbed on appeal, that an "integration maintenance" purpose underlies the sign restrictions. Thus the District Court's findings amply support the conclusion that the Municipalities have done just what *Linmark Assocs.* forbids: they restrict "for sale" signs in order to deny residents housing information that the government disapproves.

III. THE APACHE STREET AFFIRMATIVE MARKETING PLAN VIOLATES THE EQUAL PROTECTION RIGHTS OF BLACK HOMESEEKERS AND BROKERS.

SSHC's Brief confirms the importance of the question raised in this Petition when it acknowledges that "thousands" of other communities have in place "affirmative marketing" programs, and thus will look to this case for guidance. Tellingly, however, SSHC fails to identify *any* other such program that has sought to "maintain integration" at the expense—both in lost opportunity and stigma—of the historic *victims* of racial discrimination. To leave the Court of Appeals' decision in place would risk tempting other communities to stand fair housing principles on their heads by attempting to "manage" their black populations.

The Apache Street Plan differs in a crucial way from plans, such as the NAR's Voluntary Affirmative Marketing Plan, which seek to ensure equal information to whites and minorities. The Apache Street Plan did not seek to redress an information deficit among white buyers; as the majority race, whites have full access to housing and housing information in Park Forest. Instead, the Plan sought to manage the black population on Apache Street in order to counter the "perception" that Apache Street was a "black block." (Pet., p. 12.)

Thus the Plan singles out blacks—and not whites, asians, hispanics or any other racial or ethnic group—as a threat to community health and actively seeks to limit their numbers. Black brokers, like black homeseekers, feel the impact of that stigma. This burden is precisely what this Court warned against in *City of Richmond v. J.A. Croson Co.*:

> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions

> of racial inferiority and lead to a politics of racial hostility.

488 U.S. 469, 493 (1989). Even if the Plan had not deliberately diminished black housing opportunity on Apache Street, therefore, it still imposed a constitutionally unacceptable stigmatic burden on the historic victims of housing discrimination.

SSHC does not attempt to deny that its AMP considers only the race of the homeseeker. Instead, Park Forest and SSHC assertedly had a compelling interest in ensuring that they "did not become . . . 'passive participant[s]' in the Chicago area's racially discriminatory dual housing market." (SSHC Br., p. 27.) When a dual housing market arises, however, it does so because whites, who are free to live wherever they choose, choose not to live near blacks. The Apache Street Plan's focus on obtaining white, rather than black, buyers for three specific homes validates white resistance to black entry and fosters the stigmatizing perception that blacks, alone, are a group whose numbers must be managed lest they spoil the community. (*See* DX 437.) Accordingly, Park Forest and the SSHC have failed to demonstrate a compelling governmental interest and the Apache Street AMP cannot survive strict scrutiny.

The SSHC's attempt to wish away former President Bean's testimony that the Apache Street Plan was "one of the things *we felt we had to do*" (Tr., 301 (emphasis added)) is unavailing. The testimony cited by SSHC (SSHC Br., p. 9) simply establishes that SSHC saw to the details and form of the Plan; nothing Bean said contradicts his testimony that Park Forest leaders were intimately involved in conceiving the Plan's substance and viewed it as something for which they were responsible. (*See, e.g.*, Tr. p. 713 (Village "require[d] that the properties when sold be marketed affirmatively").)

SSHC relies principally on a finding that some brokers (who were not necessarily NAR or GSSBR members) steered homeseekers on Apache Street two decades ago to portray Petitioners' interests as diverse from those of black homeseekers. (SSHC Br. at 18.) (SSHC's "evidence" of present steering distorts both the District Court's findings and the law. The court found that brokers simply respond to homeseekers' preferences: "they are followers and not leaders of change in housing patterns." (App., p. 69.) Such a response is not steering. *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1530 (7th Cir. 1990).) Much more recently, however, the NAR and the Chicago Far-South Suburban Chapter of the National Association for the Advancement of Colored People concurred in their objection to the integration maintenance policies jointly developed by SSHC and the Municipalities. 53 Fed. Reg. 26,318 (1988). Thus the SSHC's implicit suggestion that black homeseekers might actually favor municipal programs designed to "manage" their numbers—in a way the program manages no other ethnic or racial group—is as unsupported by fact as it is by logic. Petitioners will vigorously and fairly represent both their black members and customers in this important case.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the Seventh Circuit Court of Appeals should be granted.

Respectfully submitted,

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